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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 42

JOHN LEE, PETITIONER

vs.

PAUL J. MADIGAN, WARDEN, FEDERAL PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 10, 1957
CERTIORARI GRANTED MARCH 17, 1958

Supreme Court of the United States

OCTOBER TERM, 1957

No. 857

JOHN LEE, PETITIONER

vs.

PAUL J. MADIGAN, WARDEN, FEDERAL PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

	Original	Print
Record from the U.S.D.C. for the Northern District of California, Southern Division	1	1
Excerpt from docket entries	1	1
Petition for writ of habeas corpus and affidavit in support thereof	3	3
Exhibit "A"—Order of remission of unexecuted portion of sentence of confinement	13	10
Exhibit "B"Letter from Department of the Army, dated September 24, 1956, to Mr. Carl L. Rhoads	14	11
Affidavit of John Lee in support of petition	16	12
Order to show cause	19	13
Motion to dismiss	20	14
Appearance of counsel	21	15
Return to order to show cause	22	15
Stipulation re: Withdrawal of motion to dismiss and submittal of return to order to show cause	26	17
Traverse to respondent's memorandum of law	27	18
Appearance of counsel	40	28

	Original	Print
Record from the U.S.D.C. for the Northern District of California, Southern Division—Continued		
Order denying issuance of writ of habeas corpus	41	28
Notice of appeal	46	31
Clerk's certificate (omitted in printing)	52	32
Proceedings in U.S.C.A. for the Ninth Circuit	53	32
Minute entry of argument and submission (omitted in printing)	53	32
Minute entry of Order directing filing of opinion and filing and recording of judgment	54	32
Opinion, Barnes, J.	55	33
Judgment	63	40
Clerk's certificate (omitted in printing)	64	40
Order granting motion for leave to proceed in forma pauperis and petition for writ of certiorari	65	41

[fol. 1] **IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

No. 35907-Civil

JOHN LEE, PETITIONER,

- VS -

PAUL J. MADIGAN, the Warden or his successor, Federal Penitentiary, Alcatraz, Island, California, RESPONDENT.

EXCERPT FROM DOCKET ENTRIES

1956

October 15. Filed petition for writ of habeas corpus.

• • • •

October 15. Filed order to show cause, returnable October 18, 1956 at 3 PM. (Harris)

October 17. Ordered hearing on order to show cause advanced to 9 AM, October 18, 1956. (Harris)

• • • •

October 18. Hearing on order to show cause. Richard Foster presented a motion to dismiss. After hearing respective parties, ordered memos. filed and cause submitted on receipt of memos. (Harris)

October 18. Filed motion to dismiss.

October 18. Filed appearance of Counsel. (Robert E. Hannan)

• • • •

November 7. Ordered after hearing ex parte motion of defendant to withdraw motion to dismiss, counsel to present formal motions. (Harris)

November 16. Hearing on ex parte motion for withdrawal of motion to dismiss, return to order to show cause, etc. Plaintiff granted ten days to file traverse to return. Exhibits introduced and case continued to November 30, 1956 for further hearing. (Harris)

November 16. Filed return of defendant to order to show cause.

• • • •

1956

November 16. Filed stipulation for withdrawal of motion of defendant to dismiss.

November 27. Filed traverse of petitioner to return.

• • • •

November 30. Filed appearance of counsel for plaintiff.

November 30. Ordered after hearing case submitted on order to show cause. (Harris)

[fol. 2] 1957

January 23. Filed order denying habeas corpus. (Harris)

January 24. Mailed copies order to petitioner, warden, DA & atty. for petitioner.

February 4. Filed notice of appeal by plaintiff.

February 5. Mailed notices.

February 11. Filed application of plaintiff to proceed in forma pauperis.

February 11. Filed order granting petitioner leave to appeal in forma pauperis. (Harris)

February 12. Mailed copy order to counsel for petitioner.

February 27. Filed appellant's designation of record on appeal.

[fol. 3] IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 35907

JOHN LEE, PETITIONER

vs.

PAUL J. MADIGAN, THE WARDEN, or his successor, Federal Penitentiary, Alcatraz Island, California, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS and AFFIDAVIT IN SUPPORT THEREOF—Filed October 15, 1956

Now comes JOHN LEE, petitioner herein, by his attorneys, Charles Upton Shreve and Carl L. Rhoads, and shows the Court as follows:

1. Jurisdiction of this proceeding is conferred upon this Court under the Habeas Corpus Clause of Article I, Sec. 9 of the Constitution of the United States, Article III, Sec. 2 of the Constitution and Chapter XXIX Manual for Courts-Martial, United States, 1951.

2. That John Lee is a resident of Pennsylvania and a citizen of the United States who resided in Pennsylvania until his induction into the U.S. Army on October 23, 1942.

[fol. 4] 3. That petitioner is restrained of his liberty by virtue of order, warrant and direction of the Attorney General of the United States and his designated agents and employees.

4. That petitioner is now imprisoned by The Warden, Federal Penitentiary on Alcatraz Island, California, and that he is detained on Alcatraz Island, within the jurisdiction of this court.

5. That petitioner was dishonorably discharged from the U.S. Army on June the 12th, 1947 at the Branch United States Disciplinary Barracks, Camp Cooke, California.

6. That petitioner was convicted on September the 13th, 1949 of conspiracy to commit murder and was sen-

tenced to death; said trial arising out of an incident which took place while petitioner was a prisoner at Camp Cooke, California.

7. That petitioner appealed the conviction and the sentence to the Judge Advocate General and by mandatory review, to the Secretary of the Army, Washington, D.C. and the sentence was commuted to life imprisonment.

8. That petitioner was subsequently transferred to the U. S. Penitentiary at Atlanta, Georgia from which he was later transferred to Alcatraz Island, California.

9. That petitioner is now imprisoned by the Warden, U. S. Penitentiary, Alcatraz Island, California, his agents and employees, with offices on Alcatraz Island, California, and that he is detained on Alcatraz Island, California, within the jurisdiction of this Court.

[fol. 5] 10. That the Statute of Limitations of one year precludes the filing of a petition for a new trial.

11. That petitioner has now exhausted his appellate remedies available through the military courts.

12. That petitioner filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Northern District of California, Southern Division, being Civil No. 34131, on October 18, 1954, but that an Order was entered October 22, 1954, dismissing petitioner's petition for the reason that:

"The petitioner has filed an application for a Writ of Habeas Corpus challenging the legality of a life sentence imposed by a United States Court Martial on September 13, 1949, upon conviction of the offense of conspiracy to commit murder. The petition states that the offense was committed while the petitioner was a prisoner in the custody of the United States Army at Camp Cooke, California, and after the petitioner had been dishonorably discharged from the United States Army.

"The return to the order to show cause alleges, the accuracy of which petitioner concedes, that petitioner is imprisoned in the United States Penitentiary at Alcatraz, California, under and by virtue of a judgment and sentence of a General Court Martial approved on the 28th day of March, 1947, as modified by an order of the Secretary of the Army on the 16th day of April, 1949, sentenc-

ing the prisoner to a term of twenty years. It was this sentence that the petitioner was in the process of serving when the offense was committed at Camp Cooke, Cali- [fol. 6] fornia, for which the life sentence was imposed. The petitioner does not challenge the validity of the twenty-year sentence, which the records show was imposed for a crime committed by the petitioner when he was a member of the United States Army and while stationed in France. The return also shows that the expiration of the twenty-year judgment and sentence with part good time credit will occur on October 24, 1960.

"It is obvious, therefore, that the petitioner is being detained by the Warden under a valid sentence. In this situation this Court is clearly without jurisdiction to hear the petition. It is only necessary to cite a few of the many cases which support this conclusion.

See: McNally vs. Hill, Warden, 293 U.S. 131;
Dunlap vs. Swope, 9th Cir., 103 F. 2d 19;
Lopez vs. Swope, 9th Cir., 204 F2d 8; and
Butterfield vs. Wilkinson, 9th Cir., No. 14035, decided July 23, 1954.

"The petitioner challenges the jurisdiction of the Army Court Martial over the offense at Camp Cooke. He contends he had been dishonorably discharged two years before the offense was committed and therefore the civil, not the military courts, had jurisdiction. His challenge to that sentence is pre-mature, and therefore this Court does not reach the merits of his petition.

"Since this Court is without jurisdiction, it is

"Ordered that petitioner's petition for a writ of [fol. 7] habeas corpus be and the same is hereby dismissed without prejudice, and the order to show cause heretofore issued out of this Court is hereby discharged."

/s/ Oliver J. Carter,
U.S. District Judge

13. An appeal was taken to the United States Court of Appeals for the Ninth Circuit, San Francisco, California, being case No. 14,608 which was heard on July 28,

1955. An Order was entered, on September 14, 1955, affirming the decree of the United States District Court, Northern District, the appeals court said,

"The district court refused relief because the petition for the writ reveals upon its face that even if the petitioner's attack upon the validity of his conviction by a United States (Army) Court Martial was upheld, it would not act to release the petitioner from custody, since he is also being held under a former unexpired sentence, the validity of which is not attacked.

"Petitioner claims he has been denied "due process" under the Fifth and Sixth Amendments to the United States Constitution, in that the first, or valid sentence, will not expire for around six years and that he may be prejudiced if the validity of the second sentence is not inquired into promptly. The basis for the claim of invalidity is that petitioner was tried [fol. 8] by a United States (Army) Court Martial after petitioner had been restored to civilian status, for an alleged offense committed while he was a member of the United States Army.

"Petitioner seeks to bolster his claim that the district court should have taken jurisdiction and decided the merits of it, by citing *Gutterman* v. *Hiatt, Warden*,. 1946 D.C. Pa., 65 F. Supp. 285, and *U. S. ex rel. Pruett* v. *Hiatt*, 1944, 55 F. Supp. 993. Neither of these cases supports the claim. In fact, they are directly against it. It is true the court in thte Gutterman case, at page 288, said:

' • • • (it) considered petitioner's contentions as to both sentences in order that he may be fully advised in relation thereto.'

"The ruling on the point of using habeas corpus in the circumstances was, however, as follows:

'As already stated, petitioner is restrained by reason of two sentences, either of which considered independently, would not as yet have expired; consequently, if any one of the two sentences is valid, he would not be entitled to immediate release.' (citing numerous authorities.) 65 F. Supp. 285, 288.

[fol. 9] "This court has held to the principle stated in the quotation, in the following cases:
Ex parte Mèlendez, 9 Cir., 1938, 98 F.2d 791;
McNealy v. *Johnston,* 9 Cir., 1938, 100 F.2d 280;
Dunlap v. *Swope,* 9 Cir., 1939, 103 F.2d 19;
Demaurez v. *Squier,* 9 Cir., 1941, 121 F.2d 960;
Graham v. *Squier,* 9 Cir., 1944, 145 F.2d 348
McDonald v. *Johnston,* 9 Cir., 1945, 149 F.2d 768;
Oddo v. *Swope,* 9 Cir., 1951, 193 F.2d 492;
Woollomes v. *Heinze,* 9 Cir., 1952, 198 F.2d 577.

"The Supreme Court of the United States has definitely settled the question in *McNally* v. *Hill,* 1934, 293 U. S. 131, 137, wherein it says:

'There is no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could not affect the lawfullness of the custody and detention, and no suggestion of such use has been found in the commentaries on the English common law.'

"The judgment is affirmed."

14. A Petition for a Writ of Certiorari to the Supreme Court of the United States was filed on December 30, 1955, being case No. 599 and certiorari was denied on February 27, 1956.

15. An appeal was made to the United States Board of Parole, Washington, D.C. to release the petitioner on a parole status from the twenty year sentence, under which he was originally imprisoned, (Petitioner has become eligible for parole consideration from such sentence on January 27, 1953) so that he could begin to serve the [fol. 10] life sentence which petitioner is attacking by this petition for Writ of Habeas Corpus.

16. On September 27, 1956, petitioner, through his attorney, was notified that the Department of the Army had ordered a remittance of the unexecuted portion of the sentence to confinement which was adjudged on May 27, 1946. Therefore as a result of this remittance of the first sentence, the petitioner began to serve the life sentence, (adjudged on September 13, 1949) on September 20, 1956. He is now being imprisoned pursuant to this

life sentence which is being attacked by this petition for Writ of Habeas Corpus. (See exhibits A & B attached hereto)

17. That petitioner is now being illegally imprisoned and in denial of the Fifth Amendment of the United States Constitution inasmuch as the General Court Martial which convicted him on September the 13th, 1949, was without jurisdiction to try the petitioner since he had already been dishonorably discharged from the U. S. Army on June the 12th, 1947, and was a civilian in custody of the Army authorities but not under Army jurisdiction on June the 10th, 1949 when the events took place which gave rise to his second court-martial for which this petition is brought.

18. Petitioner was a civilian in Army control at the time of this alleged offense and hence he should have been tried in the Federal District Court of California which had legal jurisdiction and not by Court Martial which was without legal jurisdiction to try him.

[fol. 11] 19. Petitioner came under civilian legal jurisdiction when a "change of status" was effected as a result of the execution of his dishonorable discharge from the U. S. Army on June the 12th, 1947.

20. In support of this Petition, petitioner has attached hereto, and makes a part hereof, the affidavit of John Lee, which is petitioners Exhibit A.

WHEREFORE, YOUR PETITIONER PRAYS:

That a Writ of Habeas Corpus may be issued to inquire into the cause of the imprisonment and detention of petitioner;

That upon the final hearing of this Petition this Court will enter its Order and Decree declaring that petitioner's imprisonment is illegal and constitutes a denial of due process of law under the Fifth Amendment of the United States Constitution and directing that the said Warden deliver petitioner to the custody of the Federal District

Attorney for the California District to stand trial for this alleged offense.

JOHN LEE
Petitioner

CHARLES UPTON SHREVE

CARL L. RHOADS
Carl L. Rhoads
Attorneys for Prisoner and Petitioner
716 Ford Building
Detroit 26, Michigan
WOodward 2-4056

[fol. 12] Let a writ issue as prayed for in the foregoing petition.

Judge, United States District Court

San Francisco, California

STATE OF CALIFORNIA)
) ss.
COUNTY OF San Francisco)

John Lee, being first duly sworn to state the truth, deposes and says that he is the petitioner named in the foregoing petition, that he has read the same and known the contents thereof, and that the same is true according to his information, knowledge and belief.

JOHN LEE
Petitioner

Subscribed and sworn to before me this 15th day of October, A.D. 1956.

J. B. LATIMER

Associate Warden authorized by the Act of February 11, 1939 to administer oaths.

(SEAL)

[fol. 13] EXHIBIT "A" TO PETITION

AGAO-C Lee, John
(4 Sep 56) PMGK-CC

20 September 1956

In the case of Prisoner John Lee, 33 402 974, confined at the United States Penitentiary, Alcatraz Island, California, the unexecuted portion of the sentence to confinement published in General Court-Martial Orders No. 84, Headquarters, Western Base Section, European Theatre, APO 513, dated 28 March 1947, is remitted.

By Order of Wilber M. Brucker, Secretary of the Army:

/s/ J. M. COLLINS
Adjutant General

[fol. 14] EXHIBIT "B" TO PETITION

DEPARTMENT OF THE ARMY
Office of the Secretary of the Army
Washington 25, D. C.

September 24, 1956

Mr. Carl L. Rhoads
Attorney at Law
19 Salliotte Road
Ecotse 29, Michigan

Dear Mr. Rhoads:

This is with reference to your visit in this office on August 20, 1956, during which you discussed the case of prisoner John Lee with Lt. Colonel Louis L. Haupt.

As Colonel Haupt indicated to you, I interviewed Lee on August 20, 1956, at the United States Penitentiary, Alcatraz, California to determine whether special clemency action might be granted in his case. After careful consideration by the Army and Air Force Clemency and Parole Board upon my return to Washington, it was decided to remit the unexecuted portion of Lee's sentence to confinement adjudged on May 27, 1946.

As a result he will now begin to serve his life sentence adjudged on September 13, 1949.

I am pleased to advise you of this favorable action.

[fol. 15]

Sincerely yours,

WM. J. BACON
Colonel, USA Ret
Special Assistant OSA

[fol. 16] IN UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
Southern Division

JOHN LEE, PETITIONER,

- VS -

PAUL J. MADIGAN, THE WARDEN, or his successor, Federal Penitentiary, Alcatraz Island, California, RESPONDENT

AFFIDAVIT OF JOHN LEE

STATE OF CALIFORNIA)
) ss.
COUNTY OF San Francisco)

JOHN LEE, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition:

1. That petitioner was dishonorably discharged from the United States Army on June the 12th, 1947.

2. That on June the 10th, 1949, after his dishonorable discharge had been executed on June the 12th, 1947, he became involved in an incident at Camp Cooke, California.

3. That on September the 13th, 1949, he was court-martialed for the alleged offense of June the 10th, 1949, [fol. 17] and was convicted and sentenced to death.

4. That such conviction and sentence were both appealed with the result that the conviction was affirmed and the sentence was commuted to life imprisonment.

5. That petitioner has exhausted his appelate remedies through the military courts.

JOHN LEE
Petitioner

CHARLES UPTON SHREVE

[fol. 18] CARL L. RHOADS
Carl L. Rhoads
Attorneys for Prisoner and Petitioner
716 Ford Building
Detroit 26, Michigan
WOodward 2-4056

STATE OF CALIFORNIA)
) ss.
COUNTY OF San Francisco)

JOHN LEE, being first duly sworn to state the truth, deposes and says that he is the petitioner named in the foregoing affidavit, that he has read the same and knows the contents thereof, and that the same is true according to his information, knowledge and belief.

JOHN LEE
John Lee
Petitioner

Subscribed and sworn to before me this 15th day of October A.D. 1956.

J. B. LATIMER

Associate Warden authorized by the Act of February 11, 1938 to administer oaths.

SEAL

(File Endorsement Omitted)

[fol. 19] IN UNITED STATES DISTRICT COURT

ORDER TO SHOW CAUSE—October 15, 1956

Good cause appearing therefor and upon reading the verified petition on file herein;

IT IS HEREBY ORDERED that *Paul J. Madigan,* Warden of the United States Penitentiary, Alcatraz, State of California, appear before this Court on the *18th* day of *Oct., 1956,* at the hour of 3 P.M. of said day, to

show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the *United States Penitentiary, Alcatraz,* State of California, by mail and that a copy of the petition and this order be served upon the *United States Attorney,* his representative herein.

DATED: Oct. 15, 1956.

GEORGE B. HARRIS
United States District Judge

(File Endorsement Omitted)

[fol. 20] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed October 18, 1956

Comes now PAUL J. MADIGAN, Warden of the United States Penitentiary at Alcatraz, California, through Lloyd H. Burke, United States Attorney for the Northern District of California and Richard H. Foster, Assistant United States Attorney, and moves to dismiss the petition of habeas corpus herein for the following reasons:

1. The petition fails to state sufficient facts to justify the petitioner's release from custody of the respondent.

2. The petition does not state sufficient facts to show that petitioner is in custody in violation of the Constitution, laws or treaties of the United States.

LLOYD H. BURKE
United States Attorney

By Richard H. Foster
RICHARD H. FOSTER
Assistant United States Atorney

(File Endorsement Omitted)

[fol. 21] IN UNITED STATES DISTRICT COURT

APPEARANCE AS OF COUNSEL—Filed October 18, 1956

TO THE CLERK OF THE COURT:

Please enter my appearance as of counsel, in the above-entitled cause, along with Charles Upton Shreve and Carl L. Rhoads, 716 Ford Building, Detroit 26, Michigan (WOodward 2-4056), the attorneys of record.
Dated: October 18, 1956

ROBERT E. HANNON
Attorney at Law
Post Office Building
6475 Castro Valley Blvd.
Castro Valley, California
Jefferson 7-2345

(File Endorsement Omitted)

[fol. 22] IN UNITED STATES DISTRICT COURT

RETURN TO ORDER TO SHOW CAUSE—Filed November 16, 1956

Comes now PAUL J. MADIGAN, Warden of the United States Penitentiary at Alcatraz, California, through his attorneys LLOYD H. BURKE, United States Attorney, and RICHARD H. FOSTER, Assistant United States Attorney, and JAMES W. GRANT, Special Assistant United States Attorney, and for return to order to show cause, states as follows:

I

Petitioner is confined in the United States Penitentiary at Alcatraz, California by virtue of a sentence by a General Court-Martial on September 13, 1949 imposing the death penalty which was later commuted by the President of the United States to life imprisonment as set forth in Paragraph IV below.

II

That the record of the General Court-Martial was reviewed by the Staff Judge Advocate and the sentence was approved by the Convening Authority on November 17, 1949.

III

That the record of trial was reviewed by a Board of Review in the Office of The Judge Advocate General in the Department of the Army on March 29, 1950 and found legally sufficient to support the findings and the sentence, that the record of trial was thereafter on July 20, 1950 reviewed by the Judicial Council in the Office of The Judge Advocate General in the Department of the Army [fol. 23]and found legally sufficient to support the findings and sentence.

IV

That on October 4, 1950, The Judge Advocate General of the Department of the Army concurred in the opinions of the Board of Review and the Judicial Council and submitted the record of trial to the Secretary of the Army who on October 5, 1950 concurred therein and forwarded the record of trial to the President of the United States; that on October 9, 1950 the President of the United States commuted the sentence of the Court-Martial to confinement at hard labor in a United States Penitentiary for the term of the natural life of the petitioner and ordered the sentence as commuted into execution.

V

That the petitioner has not exhausted his administrative remedies by petitioning The Judge Advocate General of the Department of the Army for a new trial pursuant to the provisions of the 53rd Article of War (41 Stat. 787), as amended by the Act of June 24, 1948 (62 Stat. 639), or pursuant to Section 12 of the Act of May 5, 1950 (64 Stat. 147; 50 U.S.C. 740).

VI

Attached to the original hereto and made a part hereof as Exhibit A is a copy of the record of trial of the General Court-Martial referred to in Paragraph I above.

VII

Attached to the original hereto and made a part hereof as Exhibit B is a copy of the opinion of the Staff Judge Advocate and the action of the Convening Authority re-
[fol. 24] ferred to in Paragraph II above.

VIII

Attached to the original hereto and made a part hereof as Exhibit C is a copy of the opinion on the Board of Review, a copy of the opinion of the Judicial Council, and a copy of the Order of the President of the United States, referred to in Paragraphs III and IV above.

IX

Attached to the original hereto and made a part hereof as Exhibit D is a Certificate of the Acting The Judge Advocate General of the Department of the Army of the non-existence of a record of petition referred to in Paragraph V above.

WHEREFORE, since the petitioner has not exhausted his administrative remedies pursuant to the 53rd Article of War, as amended, supra, nor pursuant to Section 12 of the Act of May 5, 1950, supra, and since the Court Martial by which the petitioner was tried had jurisdiction, and since the petitioner is properly in his custody, respondent prays that the order to show cause be discharged and that the petition for habeas corpus be denied. Dated: November 6, 1956.

LLOYD H. BURKE
United States Attorney

By RICHARD H. FOSTER
Assistant United States Attorney

[fol. 25] By JAMES W. GRANT
Special Assistant United States Attorney

(File Endorsement Omitted)

[fol. 26] IN UNITED STATES DISTRICT COURT

STIPULATION—Filed November 16, 1956

IT IS STIPULATED by and between attorney for petitioner and attorneys for respondent that the motion to dismiss heretofore filed may be withdrawn, and a re-

turn to order to show cause inter-alia, incorporating the whole record of petitioner's courts martial and a review thereof, substituted therefor.

LLOYD H. BURKE
United States Attorney

By RICHARD H. FOSTER
Assistant United States Attorney
Attorney for Respondent

ROBERT E. HANNON
Attorney for Petitioner

(File Endorsement Omitted)

[fol. 27] IN UNITED STATES DISTRICT COURT

TRAVERSE TO RESPONDENT'S MEMORANDUM OF LAW—
Filed November 27, 1956

This traverse will deal only with the question of whether or not petitioner committed the murder for which he was convicted, in "time of peace" in the sense intended in Article of War 92 (10 U.S.C. 1564).

A separate traverse dealing with the question of whether or not petitioner has exhausted his administration remedies under Article of War 53 (U.S.C. 1525), or Section 12 of the Act of May 5, 1950 (64 Stat. 108; 50 U.S.C. .740) is attached hereto and is made a part of petitioners Traverse to Respondent's Memorandum of Law.

PETITIONER WAS CONVICTED IN TIME OF PEACE.

Respondents contend that June the 10th, 1949, when the incident took place which culminated in the general court-martial conviction of petitioner, on September the 13th, 1949, for murder committed in the Camp Cooke, California, Disciplinary Barracks, was not "in time of peace" in the sense intended in Article of War 92 (10 U.S.C. 1564). In support of their contention they have cited the World War I case of *Kahn* v. *Anderson*, 255 U. S. 1; as standing for the principle that "time of peace"

means, "not a mere cessation of hostilities, but peace in the complete sense, officially proclaimed." In that we agree but in order to determine what the court meant [fol. 28] with such words, we must look at the facts of the case.

In *Kahn* v. *Anderson*, supra, the accused had been placed on trial, before a general court-martial, on November 4, 1918, for murder in violation of the 92d Article of War. The trial continued until November 25. 1918, when the petitioner was found guilty as charged. On June 11, 1920, a petition for Habeas Corpus was filed to obtain his release from the United States Disciplinary Barracks, Leavenworth, Kansas. Among other grounds alleged in the petition was the one,

> 4. "That in no event had the court-martial power to try them for murder under the conditions existing at the time of the trial." Here the petitioners had argued, "that, because, when the trial occurred, it was time of peace, no jurisdiction existed to try for murder, as article 92 provided that "—no person shall be tried by court-martial for murder or rape committed within the geographical limits of the states of the Union and the District of Columbia in time of peace "That complete peace, in the legal sense, had not come to pass by the effect of the Armistice and the cessation of hostilities, is not disputable. *Hamilton* v. *Kentucky*, Distilleries and Warehouse Co., 251 US 146"—*See McEbrath* v. *United States*, 102 US 426, where it was expressly decided that the limitation "except in time of peace", on the power of the President to summarily dismiss a military officer, contemplated not a mere cessation of hostilities, but peace in the complete sense, officially proclaimed.

[fol. 29] Indeed, in that case it was pointed out that this significance of the words had received the sanction of Congress, and had been made the basis for the adjustment of controversies depending upon the time when peace was established."

We are in full accord with the principle which the Court laid down in *Kahn* v. *Anderson*, supra, wherein they held that the signing of the Armistice on November

11th, 1918, did not result in, "time of peace" so as to cause the court-martial, which had convened on November 4th, 1918, to lose jurisdiction over the person and the offense of murder. There had been, "a mere cessation of hostilities" not "peace in the complete sense, officially proclaimed." The Armistice of World War I, November 11th, 1918, has the same legal significance as the cessation of hostilities in World War II, on August 14th, 1945. Neither has the effect of inaugurating, "time of peace." Article 43, Statute of Limitations, "Uniform Code of Military Justice", 1950, states,

> E. "In the case of any offense the trial of which in time of war is certified to the President by the Secretary of the Department to be detrimental to the prosecution of the war or inimical to the national security, the period of the limitation prescribed in this article shall be extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress."

"The President's proclamation on December 31, 1946, and the Joint Resolution of Congress on July 25, 1947 (P.L. 239, 80th Cong., 61 Stat. 449) have been held to [fol. 30] have officially declared the end of World War II," *Corpus Juris Secundem*, Volume 93, Paragraph 42, "Termination of War and Treaties of Peace."

"The cessation of hostilities in World War II occurred on August 14, 1945. The President's proclamation of the cessation of hostilities has been held not to be an official termination of a state of war Crudon v. Cloyd W. Miller Co., D.C. Ohio, 74 F. Supp. 546, 333 US 138, 92 L. Ed. 596, 68 S. Ct. 421 but it nevertheless inaugurates peace in fact *"Crudon* v. *Cloyd W. Miller Co.*, supra."

The Presidential Proclamation terminating hostilities on December 31, 1946, has been held to have "inaugurated" "peace-in-fact" though it did not mark the termination of the war." *Crudon* v. *Cloyd W. Miller Co.*, supra. The Joint Resolution of Congress, July 25, 1947 (P.L. 239, 80th Cong., 61 Stat. 449, did terminate the war within the meaning of Article 43, "Statute of Limitations," *Uniform Code of Military Justice*, 1950, whereas is stated,

"Except as otherwise provided in this article, a person charged with desertion in time of peace or any of the offenses punishable under articles 119 through 132 inclusive shall not be liable to be tried by court-martial or punished under Article 15 if the offense was committed more than three years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command."

The Joint Resolution, is titled, "To terminate certain [fol. 31] emergency and war powers." It provided for the termination of a large number of emergency and war powers but we will direct our attention only to those which have a material bearing on the issue in the case at bar.

> First, it terminated "Section 69 of the National Defense Act of June 3, 1916, as amended by section 7 of the Act of June 15, 1933, (48 Stat. 156); The provision authorizing the extension of enlistments in the Regular Army or the Enlisted Reserve Corps, in force at the outbreak of war or entered into during its continuation, for six months after its termination contained in the Act of March 15, 1940 (54 Stat. 53, 61).

Second, it terminated the special authority by which the Statute of Limitations was tolled as to certain offenses when committed "in time of war"—Act of June 4, 1920 (41 Stat. 794) so that after July 25, 1947, the peace time statute of limitations as to prosecution for all offenses other than those specially excepted again became operative. All during World War II such Statute of Limitations had not been in effect.

The Joint Resolution of Congress, July 25, 1947, has been universally accepted by the United States Court of Military Appeals as having inaugurated "time of peace" so as to bring into application the peace-time statute of limitations which had been revoked "in time of War", by Presidential proclamation.

"For desertion in time of peace the period of limitation prescribed by Article of War 39 upon trial and punish- [fol. 32] ment by courtmartial was three years. World War II was terminated by Congress with respect to Ar-

ticle of War 58 on 25 July 1947 (P.L. 239, 80th Cong., 61 Stat. 449). The offense of desertion in this case is alleged to have been committed on 26 April 1948. It is thus apparent that the statute of limitations had run against the offense."

This was very clearly stated in the general court martial case decided, 30 August 1951, *United States* v. *Taylor*, 1 CMR 293.

The same rule has been applied in every other Court-Martial case involving the offense of desertion.

United States v. *Meyer* 1 CMR 562, affirmed in *United States* v. *Meyer* 2 CMR 70;
United States v. *Schauf* 2 CMR 325, 328;
United States v. *Nichols* 2 CMR 484, affirmed in *United States* v. *Meyer* 6 CMR 27;
United States v. *Johnson* 6 CMR 810;
United States v. *Nichols* 6 CMR 27;
United States v. *Johnson* 10 CMR 557;
United States v. *Taylor* 11 CMR 428;
United States v. *Brown* 11 CMR 618;
United States v. Ayers 12 CMR 413.

It is quite persuasive that Congress has seen fit to adopt the Joint Resolution of July 25, 1947, as marking the end of World War II in determining what is "war time" service as to determine the World War II veterans eligibility for a large number of disability and other educational [fol. 33] benefits. At 42, U.S.C. 417 "Benefits for veterans" (d) (I) it provides "The term "World War II means the period beginning with September 1940 and ending at the close of July 24, 1947."

Counsel for the respondents have argued in their briefs that murder which is spelled out under Article 118, of the "Uniform Code of Military Justice", 1950 and Article 92, of the "Articles of War", 1949, which governs the case at bar, was not intended to be included as one of the offenses for which the Joint Resolution of July 25, 1947, made "time of peace". It is interesting in this connection that diligent search in this regard has failed to disclose any cases wherein Court-Martial jurisdiction has been asserted over the offense of murder when committed in the

continental United States between July 25, 1947, and the beginning of the Korean conflict, June 27, 1950. The Lee case at bar seems to be the only one wherein Court-Martial jurisdiction was asserted over this offense committed during such period. It certainly seems very likely that the offense was committed in the continental United States by some military personnel during this three year period but it would thus appear that jurisdiction over such offense committed in the continental United States was relinquished to the civil authorities. It is true that Article 118, "Murder" is not included within the articles enumerated in Article 43 (b), "Statute of Limitations" and falling within the class, "of the offenses punishable under Article 119, "Manslaughter", a lesser included offense of Article 118, "Murder" is one of the offenses for which the three year statute of limitations applies "in time of peace."

[fol. 34] Why isn't "Murder" included under Article 43 (b)? To get the answer we look at Article 43 (a) "Statute of Limitations."

"A. A person charged with desertion or absence without leave *in time of war*, (emphasis added) or with aiding the enemy, mutiny or *murder* (emphasis added) may be tried and punished at any time without limitation"

The meaning of the above sub-paragraph is crystal clear. Congress did not intend that there be any statute of limitations for aiding the enemy, mutiny or murder or for desertion or absence without leave "in time of war". But in every case where the issue of "time of war" and "time of peace" has come up in desertion and absence without leave cases the United States Court of Military Appeals has accepted the July 25, 1947, Joint Resolution of Congress, date as having inaugurated "time of peace."

United States v. Taylor (supra)
United States v. Schauf (supra) United States v. Meyer
United States v. Johnson (supra) United States v. Brown
United States v. Nichols (supra) United States v. Ayers

To attempt to argue that Congress did not intend to appeal the July 25, 1947, "time of peace" date to the crime of murder is contrary to the accepted rules of statutory

interpretation. "Murder" is one of the offenses provided for in Article 43 (a) along with "desertion or absence without leave in time of war" to say that the "time of [fol. 35] peace" rule applies to some of the offenses in the sub-paragraph and not to others in the same sub-paragraph certainly flaunts the cardinal principle of statutory interpretation to the effect that the statute will be read and interpreted in its entirety so as to determine the intent of the legislature.

It is interesting, in this same connection, to note that Article 118, "Murder," in the "Uniform Code of Military Justice", 1950 does not have the same provisions as "The Manual for Courts-Martial, U.S. Army, 1949, The Article of War, Article 92, "Murder-Rape" which in addition to defining the offenses adds,

"Provided, that no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia *in time of peace.*" (emphasis added).

The 1949 Manual is the one which controls in the case at bar. It is well recognized that if a member of the armed forces commits an act or omission by which he violates the uniform code and the local criminal law, the act or omission may be made the basis of a prosecution before a court-martial or before a proper civil court, and in some cases before both. "Manual for Courts-Martial," 1951, Paragraph 12, Page 16. But this general rule can only be applied if the person accused is a "person subject to the code". If he is a "civilian", as in the case at bar, when the offense was committed two years after discharge, then clearly the courts-martial has no jurisdiction at all over him and he is a "person" within the meaning of the Fifth and Sixth Amendments to the United States Consti- [fol. 36] tution so as to guarantee him the right, "not to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury *except in cases arising in the land or naval forces* (emphasis added), Amendment V, and "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed,*" (emphasis added.) Amendment VI.

In the case of petitioner Lee the general court-martial was without jurisdiction to try him even if he had not been discharged from the Army, for two years, prior to the date of the alleged offense. They were without jurisdiction because Congress had clearly limited the courts-martial jurisdiction, in the 1949 Manual, but not in the 1951 Manual, in the case of "murder or rape" to offenses committed not "within the geographical limits of the States of the Union and the District of Columbia in time of peace." Congress has been very careful to reserve jurisdiction over the subject matter of "murder and rape" in the United States "in time of peace" to the civil authorities to the absolute exclusion of the military. That is certainly understandable since they are clearly civil offenses and as such are better tried in the civil courts where the constitutional safeguards will be recognized and applied. There is no excuse for trying them by a military tribunal since they are not military offenses and the oft quoted "exigencies of the service" reasoning certainly cannot be applied so as to rob a civilian court of jurisdiction over a "civilian" person, in the continental United States in 1949, a "time of peace" in the common [fol. 37] sense as well as in the judicial sense.

For the respondents to argue that we were not in "time of peace" on June the 10th, 1949, merely because the Japanese treaty was signed on April 28, 1952, is not only to refuse to take judicial notice of the fact that the only real peace which has been enjoyed in the United States since Pearl Harbor was the period between July 25, 1947, and June 27, 1950, the beginning of the Korean Conflict as well as to refuse to accept the numerous decisions which have been laid down by the United States Court of Military Appeals to the effect that after July 25, 1947, was "in time of peace" for purposes of military jurisdiction over "peace time" offenses.

The fact that an amnesty and pardon was granted by Presidential Proclamation of December 24, 1952, 67 Stat. C. 24, so as to restore rights of citizenship "to all persons who deserted from the Armed Forces of the United States on or after August 14, 1945, and prior to June 25, 1950" certainly had no bearing on the crime of murder

as concerns "time of peace" or "time of war". It is very apparent that respondents are confusing "time of war", "time of peace" and "war powers". All of the cases which they have cited the exception of *Kahn* v. *Anderson*, supra, have no relation to the fundamental issue involved in the case at bar—did the United States Army have legal jurisdiction over the person of John Lee, and the offense of murder, allegedly committed on June 10th, 1949, two years after he had been discharged from the Army and two years after the Joint Resolution of Congress had "officially declared the end of World War II"? There are [fol. 38] many cases which respondents have quoted which stand for the principle that the July 25, 1947, Joint Resolution of Congress, date did not have the effect of terminating certain "war powers" of the President of the United States. Some of these continued up until the signing of the final treaty with Japan on April 28, 1952, and in fact by virtue of the Korean Conflict have, in fact, never been curtailed except in so far as the Congress has seen fit to do so by special congressional action. Some examples of such authorities which have been erroneously quoted by respondents as standing for the principle that June 1949 was "in time of war" for court-martial jurisdiction over murder in the United States are:

> Waller v. United States, 78 F. Supp. 816, No. 48602, 114 Ct. Cl. 640 (Court of Claims, decided June 28, 1948) wherein the Court of Claims held that the President, by virtue of his "war powers" still had authority to renegotiate defense contracts with government suppliers.
>
> *Wood* v. *Cloyd W. Miller Co.*, 68 S. Ct. 421, decided February 16, 1948, held that the President of the United States had authority under his "war powers" to regulate rents in "critical areas" even after the Presidential Proclamation of December 31, 1946, which marked the "termination of hostilities."

This type of case wherein the President is exerting "war powers", which are civil in nature, certainly has no relevance to the issue of criminal jurisdiction.

For the above reasons, we respectfully submit that the Army, general court-martial, which convicted petitioner, [fol. 39] Lee, of murder on September 13, 1949, at Camp Cooke, California, was entirely devoid of Jurisdiction over either the person or the subject matter and hence this petition for Habeas Corpus should be granted so as to permit the petitioner to be tried by a court which has jurisdiction over both the person and the subject matter—the civil offense of murder.

Respectfully submitted

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(File Endorsement Omitted)

[fol. 40] IN UNITED STATES DISTRICT COURT

APPEARANCE OF COUNSEL—Filed November 30, 1956

To the Clerk of said Court:

Please enter my Appearance as of Counsel, in the above entitled cause, along with Charles Upton Shreve and Carl L. Rhoads, 716 Ford Building, Detroit 26, Michigan, (WOodward 2-4056), the attorneys of record, and Robert E. Hannon, 6475 Castro Valley Boulevard, Castro Valley, California, as of counsel.

Dated: November 28, 1956.

WILLIAM F. HANNON
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(File Endorsement Omitted)

[fol. 41] IN UNITED STATES DISTRICT COURT

ORDER DENYING ISSUANCE OF WRIT OF HABEAS CORPUS—January 23, 1957

Petitioner, serving a life sentence in the federal penitentiary at Alcatraz, California, for murder committed in the Camp Cooke Disciplinary Barracks in 1949, seeks his release by means of a writ of habeas corpus. He contends that the general court martial which convicted him of the offense charged under Article 92 of the Articles of War (10 U.S.C.A. 1564) lacked jurisdiction. On June 12, 1947, he had received his dishonorable discharge from the Army. Petitioner was serving a 20-year sentence at the said barracks for the crime of armed robbery committed as a member of the United States Army while stationed overseas in France.

Petitioner relies on two bases for challenging the authority of the general court martial to proceed against

him. First, he alleges that he was a civilian,—having been dishonorably discharged; second, that he committed the crime in time of peace and hence was entitled to a trial by the civilan authorities.

Petitioner was subject to general court martial jurisdiction insofar as his status as a civilian was concerned. Article of War 2 (10 U.S.C.A. 1473); In re Craig, 70 F. [fol. 42] 969; Kahn v. Anderson, 255 U. S. 1; McDonald v. Lee, 217 F.2d 619. As stated by the Supreme Court in the Kahn case, at page 7: " . . we are of opinion that, even if their discharge as soldiers had resulted from the previous sentences which they were serving, it would be here immaterial, since, as they remained military prisoners, they were for that reason subject to military law and trial by court-martial for offenses committed during such imprisonment."

Petitioner's second point, namely, that he committed the offense "in time of peace," has been decided adversely by several courts, including the Ninth Circuit in the recent case of Osborn v. Swope, 230 F.2d. 397. In Kahn v. Anderson, supra, and Givens v. Zerbst, 255 U.S. 11, the Supreme Court held that "in time of peace," as used in the 93rd Article of War, means "peace in the complete sense officially declared." Re-establishment of peace is a matter for political determination, rather than a question for the courts.

Since the United States did not conclude its final peace treaty until several years after petitioner committed his offense, the general court martial exercised its proper power under Article of War 92. The Presidential Proclamation of April 28, 1952, entitled, "Termination of the National Emergencies, Proclaimed on September 8, 1939, and May 27, 1941," 66 Stats. C., stated:

> [fol. 43] "The state of war between the United States of America and Japan, which was the last of the aforesaid states of war still existing, was terminated by the coming into force this day of the treaty of peace with Japan signed in San Francisco on September 8, 1951."

Thus, World War II was officially concluded and *peace*, for purposes of general court-martial jurisdiction, was realized.

It is to be noted that the military authorities themselves have construed "time of peace" in a manner consistent with that enunciated by the early case of Kahn v. Anderson, supra, and as subsequently followed by the above cited authorities. Thus, in the trial of one Hightower, Court Martial 325200, 74 Board of Review 103, 117-118, the military court held that peace had not been officially proclaimed nor had treaties of peace been ratified with all nations with which a state of war existed. Accordingly, it correctly assumed that it had jurisdiction to proceed with the trial of the offense charged.

When petitioner, together with three associates, caused the death of another prisoner in the Camp Cooke Disciplinary Barracks on June 10, 1949, the general court martial had jurisdiction to try him for the crime of murder. The court martial transcript was admitted in evidence in the case and is part of the record before the court. It shows that petitioner participated in a wanton murder for which he received the death penalty. By [fol. 44] Presidential intervention the sentence was commuted to life imprisonment.

Respondent in his argument before the Court contended that petitioner had failed to exhaust his administrative remedies under then Article 53 of War (10 U.S.C.A. 1525).[1] and therefore this Court could not entertain his petition. Both Osborn v. Swope, supra, and Kethel Osborne v. Swope, 226 F.2d 908, support respondent's view. These cases, following the Supreme Court holding in Gusik v. Schilder, 340 U.S. 128, hold that a civil court [fol. 45] has no jurisdiction to inquire into the validity of a court martial conviction unless the remedy for re-

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[1] Article of War 53 (now superseded by Article 73, 50 U.S.C.A. 740). The Judge Advocate General of any of the Armed Forces is authorized "in his discretion to grant a new trial, or to vacate a sentence, . . . in any court martial case in which application is made within one year after final disposition of the case upon initial appellate review: Provided, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, which-ever is the later: . . ."

hearing provided for under Article of War 53 is exhausted. The fact that time has barred petitioner from exercising his rights under Article 53 does not permit this Court to grant relief by means of a writ of habeas corpus according to the expression of the above cited Ninth Circuit cases. If the general court martial had lacked jurisdiction over petitioner in the first instance, he would then be entitled to an immediate release. Thus it was and is appropriate that this Court determine the question of jurisdiction in the first instance.

As stated above, the authorities, including this Circuit, hold that the crime charged was committed in time of war. Thus, the general court martial had jurisdiction to proceed and there is no merit to the petition for writ of habeas corpus.

Accordingly, IT IS ORDERED that the application for writ of habeas corpus be, and the same hereby is, DENIED; the order to show cause be, and the same is, DISCHARGED; and the petition be, and the same is, DISMISSED.

DATED: JANUARY 23, 1957.

GEORGE B. HARRIS
United States District Judge

(File Endorsement Omitted)

[fol. 46] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed February 4, 1957

TO LLOYD H. BURKE and RICHARD H. FOSTER, UNITED STATES ATTORNEYS FOR THE NORTHERN DISTRICT OF CALIFORNIA, POST OFFICE BUILDING, SEVENTH & MISSION STREETS, SAN FRANCISCO, CALIFORNIA:

Notice is hereby given that petitioner, JOHN LEE, through his attorneys, CARL RHODES, CHARLES UPTON SHREVE and ROBERT E. HANNON, hereby appeals to the United States Court of Appeals For The Ninth Circuit from the order, judgment and decree of

the United States District Court for the Northern District of California, Southern Division, denying issuance of a writ of habeas corpus, made and entered on January 23, 1957.

DATED: January 30, 1957.

ROBERT E. HANNON

(File Endorsement Omitted)

[fols. 47-51] • • •

[fol. 52] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 53] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
July 9, 1957

(Omitted in Printing)

[fol. 54] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—
Filed October 11, 1957

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 55] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,466

Oct. 11, 1956

JOHN LEE, *Appellant*,

vs.

PAUL J. MADIGAN, Warden, Federal Penitentiary, Alcatraz, California, *Appellee*.

Appeal from the United States District Court for the Northern District of California, Southern Division.

OPINION—October 11, 1957

Before: LEMMON, FEE and BARNES, Circuit Judges

BARNES, Circuit Judge:

This is an appeal from a denial of a petition for a writ of habeas corpus.[1] Petitioner is in the custody of the Warden of Alcatraz Prison by virtue of a judgment and sentence of a General Court-Martial approved September 13, 1949. Petitioner was sentenced originally to death. Thereafter the sentence was reduced to life imprisonment.

The crime of conspiracy to commit murder, of which petitioner was convicted, occurred on June 10, 1949, at the Disciplinary Barracks at Camp Cook, California. Petitioner was then serving a sentence imposed by a previous Court-Martial in Paris, France, of twenty years at hard labor for robbery and assault. Those offenses were committed while petitioner was in the Army. After his Paris court-martial and sentence petitioner was dishonorably discharged from the Army on June 12, 1947.

This is the second time petitioner has been before this Court. In 1954, petitioner took an appeal from a District [fol. 56] Court order dismissing his petition for a writ of habeas corpus as being prematurely brought. We affirmed that order. *Lee* v. *Swope*, 225 F.2d 674 (1955). Thereafter

[1] 28 U.S.C.A. § 2253.

the Army Clemency Board remitted the unexpired portion of petitioner's first sentence so that on September 20, 1956, he commenced to serve and was imprisoned only under the life sentence which is the subject matter of the present petition.

Appellant maintains that on the date of his second court-martial he must be classified within one of two classes—either "civilian" or "a member of the armed forces"; that because of his previous dishonorable discharge on June 12, 1947, he was of necessity a "civilian" on June 10, 1949, when the murder was committed, and subsequently when he was tried; that after his discharge he was "in custody of the Army authorities, but not under Army jurisdiction." He also contends that the crime was committed in "time of peace"; that World War II officially terminated almost two years prior to the date of the offense.

Thus petitioner challenges the jurisdiction of the General Court-Martial (a) over the crime of murder, because he could not be tried for "murder or rape when committed in the Continental United States in time of peace" under the Manual for Court-Martial (1949) then in effect. Article of War 92 (10 U.S.C.A. §1564); (b) over his person, because as a civilian, petitioner was entitled to a civil trial by jury under the Sixth Amendment.

I. Was the crime for which petitioner was convicted and is now serving a life sentence a crime committed "in time of peace"?

The vital date is June 10, 1949. In the leading case arising out of World War I, the language "time of peace" was defined as meaning "peace in the complete sense, officially declared." *Kahn* v. *Anderson*, 225 U.S. 1, 10.

The question of when a state of war has ceased officially is for the political organs of the federal government to determine. *Ludecke* v. *Watkins*, 335 U.S. 160.[2] The war

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[2] See Woods v. Miller Co., 333 U. S. 138. Cf. The Protector, 79 U.S. 700; Ribas Y. Hijo v. United States, 194 U.S. 315; Hamilton v. Kentucky Distilleries, 251 U.S. 146.

Petitioner refers us to the cases passing on that difficult question, the police activity commonly known as the Korean War. That conflict, for many reasons, seems sui generis. With no declaration

[fol. 57] with Germany was terminated on October 19, 1951 by a Joint Resolution of Congress [3] passed that day and a Presidential Proclamation [4] promulgated pursuant thereto. This Court has previously applied this date in considering the language of Article 92. *Floyd Osborn v. Swope*, 230 F.2d 395. The war with Japan was terminated on April 28, 1952, the effective date of the Japanese Peace Treaty, signed in San Francisco on September 8, 1951.[5]

While the question presented is not judicial but political in nature, it is petitioner's assertion that a legislative ascertainment in his favor is contained in the Joint Resolution of Congress of July 25, 1947.[6] He argues that this Joint Resolution, passed "to terminate certain emergency war powers", evinces a Congressional intent to terminate the state of war. However, the absence of any reference in the Joint Resolution to Article of War 92, while specific reference is made to other Articles of War dealing with desertion (10 U.S.C.A. §1510-1511), leads us to conclude that petitioner's argument is without merit. The aforementioned dates, October 19, 1951, in respect to Germany as was held in the Osborn case, and April 28, 1952 as to Japan, mark the official termination of hostilities with those Nations insofar as Article of War 92 is concerned.[7] Accordingly,

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of war, there appeared little reason for, or purpose to, any proclamation purporting to end that which never commenced. Under such circumstances it is obvious that there had to be some judicial interpretation as to what Congress meant in using the phrase, "in time of war", as applied to the realities of the Korean conflict. We have no quarrel with those cases cited by petitioner to the effect that "*in the absence of* formal Executive or Legislative action, . . . a collection of factors" compelled the judicial conclusion that a "time of war" existed, which terminated with the Armistice in Korea on July 27, 1953. No such dearth of political pronouncements in respect to the official termination of World War II exists.

[3] 65 Stat. 451.

[4] Proclamation No. 2950, October 24, 1951, 66 Stat. c3.

[5] Proclamation No. 2974, April 28, 1952, 66 Stat. c31; Proclamation No. 2974, December 24, 1952, 67 Stat. c24.

[6] 61 Stat. 449.

[7] See also Knauff v. Shaughnessy, 338 U.S. 537, where on January 16, 1950, the Supreme Court said in another context: "Indeed a state of war still exists."

[fol. 58] at the time of the commission of the crime, a state of war existed between the United States and both Germany and Japan.

We are satisfied that the petitioner did not commit the offense for which he was convicted in time of peace.

II. Was petitioner entitled to a civil trial by jury, as a "civilian", for the crime charged to have been committed on June 10, 1949?

Article of War 2(c), 10 U.S.C.A. §1473,[8] rendered amenable to military law, including trial by military tribunal, "All persons under sentence adjudged by courts-martial". It cannot be doubted that the petitioner occupied this status both when he committed and when he was convicted of the crime of conspiracy to commit murder. Hence our sole concern is with the constitutionality of this statutory provision.

The issue is drawn even more narrowly by the fact that the Supreme Court unanimously upheld the validity of this Article in *Kahn* v. *Anderson*, supra. That decision reaffirmed an old line of cases holding that once military jurisdiction attached, it could continue to be exerted until exhausted completely. There is dictum that this would be true irrespective of the intervening discharge of the accused.[9] The specific question for this Court to decide is whether the subsequent Supreme Court opinions in *United States ex rel Toth* v. *Quarles*, 350 U.S. 11, and two consolidated cases, *Reid* v. *Covert* and *Kinsella* v. *Krueger*, 354 U.S. 1, decided June 10, 1957, in any way modify the language of Article 2(e), as interpreted in *Kahn* v. *Anderson*.

The Supreme Court in the *Toth* case specifically upheld

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[8] This section was superseded by Article 2(7) of the 1950 Uniform Code of Military Justice which subjects to military jurisdiction, "All persons in custody of the armed forces serving a sentence imposed by a court-martial".

[9] Carter v. McClaughry, 183 U.S. 365; In re Craig, 70 F. 969; ex parte Wildman, 29 Fed. Cases 1232, No. 17,653a. Decisions subsequent to the Kahn case restating the rule of law sustained therein include Moser v. Hudspeth, 10 Cir., 123 F.2d 401; Mosher v. Hunter, 10 Cir., 143 F.2d 745; McDonald v. Lee, 5 Cir., 217 F.2d 619; Steele v. Humphrey, 80 F.Supp. 544.

the Article of War 2(e). It also held that Congress could not constitutionally subject a discharged serviceman who "had no relationship of any kind with the military" to [fol. 59] trial by court-martial for a crime allegedly committed while he was serving in the armed forces.[10] Toth was arrested five months after he had received an honorable discharge and had been "wholly separated" from the Air Force.

In *Reid* v. *Covert* and *Kinsella* v. *Krueger*, the Supreme Court held that Congress could not constitutionally provide for trial by court-martial of civilian dependents accompanying military personnel overseas.[11] Coincidentally, each of those cases involved a civilian wife who had been charged and convicted of murdering her serviceman husband.

The common denominator of all three decisions, as well as the basis for them, is that the defendant in each case was a civilian with absolutely no present relationship to the military. They were all full-fledged civilians when they were tried. Toth was an ex-soldier; Mrs. Covert and Mrs. Smith never were in the armed forces. The Supreme Court regarded trial by military authorities of such persons as inimical to fundamental Constitutional safeguards guaranteed civilians. As stated by the Supreme Court in the *Covert* case,

> "The Milligan, Duncan and Toth cases recognized and manifested the deeply rooted and ancient opposition in this country to the extension of military control over civilians. In each instance an effort to expand the jurisdiction of military courts to civilians was repulsed."

Petitioner's status was far different. He was subject to military jurisdiction when he was charged, tried, convicted and sentenced for his first offenses, robbery and assault. He remained under military jurisdiction and in military

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[10] The Supreme Court therefore held invalid Article 3(a) of the 1950 Uniform Code of Military Justice.

[11] The Supreme Court therefore held invalid as applied Article 2(11) of the 1950 Uniform Code of Military Justice.

custody while serving his initial sentence. He was a military prisoner. His relationship to the military, like that of the defendant in the *Kahn* case, was close and continuing; in *Toth*, *Covert* and *Krueger*, the relationship was non-existent.

A general rule of law, heretofore noted, and firmly established long before the *Kahn* case was decided, is that [fol. 60] once jurisdiction attaches, it is retained until fully exhausted. In *Carter* v. *McClaughry*, 183 U.S. 365 and *Kahn* v. *Anderson*, supra, the Supreme Court applied this well-settled rule of law to military jurisdiction. As the Supreme Court declared in the *Carter* case at p. 383,

> "He was a military prisoner though he had ceased to be a soldier; and for offenses committed during his confinement, he was liable to trial and punishment by court-martial under the rules and articles of war."

Accordingly, the military was exercising jurisdiction over the petitioner when he committed the instant offense and when he was tried. The technical dishonorable discharge constituted a severance from the military for certain purposes, including the deprivation of various benefits, but it is unthinkable to regard it as a vitiation of all military authority over the petitioner. The Tenth Circuit, in *Mosher* v. *Hunter*, 143 F.2d 745, sets forth what we believe to be a correct statement of the law.

> It is generally true, as contended, that courts-martial jurisdiction is coexistent and coterminous with military service and ceases upon discharge or other separation from such service (Sec. 10, Chap. 4, Manual of Courts-Martial U.S. Army, 1928), and it does not extend to offenses committed against military law by those who are subsequently discharged or otherwise separated from such military service, unless courts-martial jurisdiction first attached before separation from the service, in which event jurisdiction continues until fully exhausted. (citations omitted.) Furthermore, all persons under sentence adjudged by a court-martial are subject to military law, . . . and are therefore within the jurisdiction of courts-martial for of-

fenses committed against military law. This is true although his military service ceased before jurisdiction attached and before trial and sentence."

The distinction in the relationship to the military between the petitioners in the case at bar and the *Kahn* case, and the defendants in the three latest Supreme Court decisions is crucial. We are of the opinion that none of these recent decisions destroys or undermines the *Kahn* case. The opinion in *Covert* and *Krueger* makes no men- [fol. 61] tion whatsoever of *Kahn*. *Toth* is closely in point. At least he was at one time subject to military authority and discipline; yet at the time he was tried, as the Suprement Court states repeatedly and with emphasis,[12] he was "wholly separated" from the military and had no existing relationship to it at all. There is but one reference in the *Toth* opinion to the *Kahn* case. Summarizing the law in this area, the Supreme Court stated:

> "This Court has held that the Article I clause just quoted authorizes Congress to subject persons actually in the armed services to trial by court-martial for military and naval offenses. Later it was held that court-martial jurisdiction could be exerted over a dishonorably discharged soldier then a military prisoner serving a sentence imposed by a prior court-martial. It has never been intimated by this Court, however, that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions." 350 U.S. 11, 14.

Viewing those words in the light most favorable to petitioner's position, it cannot be said that they in any way

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[12] At three different points in the opinion the Supreme Court stresses Toth's complete divorcement from the military. "At the time of arrest he had no relationship of any kind with the military," 350 U.S. at 13; "It has never been intimated by this Court, however, that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions," 350 U.S. at 14; "But Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades." 350 U.S. at 22.

cast doubt on the legal vitality of the *Kahn* case. At best they represent a mere statement of existing law. Certainly there is no rejection or disapproval of that law.

Article of War 2(e), by its express language and the holding in the *Kahn* and *Toth* cases, is controlling.

III. Did petitioner exhaust his other remedies?

In view of the conclusions reached by us with respect to petitioner's claim of lack of jurisdiction, as set forth [fol. 62] above, it is unnecessary to consider the Government's contention that petitioner did not exhaust his remedies.

The order of the District Court denying petitioner's application for a writ of habeas corpus and dismissing such petition is *Affirmed*.

(File Endorsement Omitted)

[fol. 63] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15466

JOHN LEE, *Appellant*,

vs.

PAUL J. MADIGAN, Warden, Federal Penitentiary, Alcatraz, California, *Appellee*.

JUDGMENT—Entered October 11, 1957

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is affirmed.

(File Endorsement Omitted)

[fol. 64] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1957

No. 394 Misc.

(Title Omitted)

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Ninth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—
March 17, 1958

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. Case transferred to the appellate docket as No. 857.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 42

JOHN LEE,

Petitioner,

vs.

PAUL J. MADIGAN, Warden, Federal Penitentiary, Alcatraz, California.

PETITIONER'S BRIEF

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INDEX

SUBJECT INDEX

Page

PETITIONER'S BRIEF

Opinion Below 1

Jurisdictional Statement 1

Statutes Involved 2

Specification of Error 2

Questions Presented 2

Statement of the Case 3

Summary of Argument 5

Argument

1—Constitutionality of Article of War 2(e) 6

2—Time of Peace 28

Conclusion 42

Appendix A—Article of War 2(e), 10 U.S.C. 1473 45

Appendix B—Article of War 92, 10 U.S.C. 1564 46

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Cases:

Carter v. *McClaughry*, 183 U.S. 365 ..... 10, 12, 14, 16, 19, 21, 22, 34

Coleman v. *Tennessee*, 97 U.S. 509 ..... 14, 34

Ex parte Milligan, 4 Wall. 2 ..... 39, 40

Ex parte Wildman, Fed. Case No. 17,653a 8, 11

Givens v. *Zerbst*, 255 U.S. 11 ..... 32, 33, 34, 35

Hamilton v. *Kentucky Distilleries Co.*, 251 U.S. 146 ..... 29, 30, 31

Henson v. *Welch*, 199 Fed. 2d, 367 18

In re Bogart, 2 Sowry, 396 9

In re Craig, 70 Fed. Rep., 969 8

Kahn v. *Anderson*, 255 U.S. 1 ..... 18, 19, 20, 21, 28, 32, 33, 34, 35

Page

Knauff v. *Shaughnessy*, 338 U.S. 138 ..... 32, 36
Lee v. *Swope*, 225 F2, 674 4
Ludecke v. *Watkins*, 335 U.S. 160 .....30, 32, 33, 36, 41
MacDonald v. *Lee*, 217 Fed. 2d, 619 22
Mosher v. *Hudspeth*, 123 Fed. 2d, 401 .....20, 21, 22
Mosher v. *Hunter*, 143 Fed. 2d, 745 ..... 21, 27
Reid v. *Covert & Kinsella* v. *Drueger*, 354 U.S. 1 .....10, 19, 20, 23, 25, 26, 28, 41
Steel v. *Humphrey*, 80 Fed. Supp. 745 21
Toth v. *Quarles*, 350 U.S. 11 .....9, 10, 19, 20, 28, 38, 39, 41, 42
William v. *Steel*, 194 Fed. 2d, 32 18
Woods v. *Miller Co.*, 333 U.S. 138 32
United States v. *Busbin*, 23 C.M.R. 125 .....35, 36, 37
United States v. *Gyers*, 15 C.M.R. 220 31
United States ex rel. Hirshberg v. *Cooke*, 336 U.S. 210 10
United States v. *Johnson*, 6 C.M.R. 810 36
United States v. *Meadows*, 2 C.M.R. 306 36
United States v. *Smith*, 17 C.M.R. 406 36
United States v. *Speller*, 24 C.M.R. 173 14
United States v. *Shell*, 23 C.M.R. 110 .....35, 36, 37, 38
United States v. *Sprague*, 282 U.S. 716 23

Articles of War:

Revolutionary Articles of War 6
Article 60, 1806 Articles 6, 7
Article 96, 1806 Articles 6, 7
Article of War 63, 1873 Articles of War 7
Article of War 64, 1873 Articles of War 7
Article of War 2(e), 1916 Articles 5, 6, 16, 18, 20, 21, 22
Article of War 2(e), 1949 Articles 2, 5, 22, 42
Article of War 92, 1949 Articles 2, 5, 28, 33, 38, 42

Constitution:

Article 1, Section 8, Clause 14 23
Fifth Amendment 2, 5, 8, 20
Sixth Amendment 2, 5, 20

Page

Statutes:

Revised Statutes of 1873, Title XIV, Ch. 5 7
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17 Stats. 548 7
18 Stats. 48 8
30 Stats. 484 12
39 Stats. 650 6
41 Stats. 787 6
62 Stats. 627 6
18 U.S.C.A., 4001 18
18 U.S.C.A., 4042 18
Title 28, Section 2241 1
Title 28, Section 2242 1
Title 28, Section 2243 2
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Text:

Digest of Opinions of the Judge Advocate General of the Army, Winthrop, 1896 10
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Congressional Record Vol. 53, Pt. 11, 64th Congress P. 11511 41
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	Page
German Surrender (59 Stats. 1857)	35
Japanese Surrender (59 Stats. 1733)	35
Presidential Proclamation of December 31, 1946 (12 F. Dig. 1)	33
Joint Resolution of Congress of July 25, 1947	33
German Peace Treaty, 65 Stats. 451	28
Japanese Peace Treaty, 66 Stats. C 31	28
Presidential Proclamation of April 28, 1951, 66 Stats. C 31	33
Presidential Proclamation of October 24, 1951, 66 Stats. C 3	33
47 Col. L. Rev. 225	31

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 42

JOHN LEE,

Petitioner,

vs.

PAUL J. MADIGAN, Warden, Federal Penitentiary, Alcatraz, California,

Respondent.

PETITIONER'S BRIEF

Opinion Below

The opinion of the United States Court of Appeals for the Ninth Circuit, filed October 11, 1957, is found in the record, pages 33-40. The opinion of the Trial Court is unrecorded but is found in the record, pages 28-31.

Jurisdictional Statement

This appeal is taken from a judgment of the United States Court of Appeals for the Ninth Circuit, San Francisco, California, entered October 11, 1957 (R. 40), affirming a decree of the United States District Court, Northern District of California, Southern Division, San Francisco, California, entered January 30, 1957, dismissing petitioner's petition for a writ of habeas corpus (R. 28). Jurisdiction is therefore invoked under Sections 2241, 2242 and

2243 of Title 28, United States Code. Appeal in habeas corpus proceedings is provided by Section 2253 of Title 28, United States Code.

Statutes Involved

The applicable statutes are:

1. Article of War 2(e), 10 U.S.C. 1473, Appendix A;
2. Article of War 92, 10 U.S.C. 1564, Appendix B.

Specification of Error

1. Petitioner challenges the ruling of the District Court in denying the issuance of a writ of habeas corpus as being a denial of due process of law under the Fifth and Sixth Amendments of the Constitution of the United States for the reason that petitioner, having been dishonorably discharged from the United States Army on June 12, 1947, some two years prior to his court-martial on September 13, 1949, was a civilian and therefore not amenable to court-martial jurisdiction.

2. Petitioner challenges the ruling of the District Court in denying the issuance of a writ of habeas corpus as being a denial of due process of law under the Fifth and Sixth Amendments of the Constitution of the United States for the reason that petitioner's court-martial for murder at Camp Cook, California, on September 13, 1949, was in violation of the 92nd Article of War, 10 U.S.C. 1564.

Questions Presented

1. Under the Fifth and Sixth Amendments of the Constitution, does the military have courts-martial jurisdiction over capital offenses committed by a civilian serving sentence in a military prison?

2. Since the military is deprived of jurisdiction over murder committed within the geographical limits of the United States "in time of peace", was petitioner's conviction on September 13, 1949, "in time of peace"?

Statement of Case

Appellant is now imprisoned by the Warden, Federal Penitentiary on Alcatraz Island, California.

On October 23, 1942, he was inducted into the United States Army. On May 27, 1946, he was court-martialed in Paris, France, on charges of robbery and assault; he was convicted and sentenced to a dishonorable discharge from the Army and sentenced to twenty years of confinement at hard labor. On June 12, 1947, the sentence having been approved, petitioner was dishonorably discharged from the Army. He was returned to Camp Cook, California, from France to serve the sentence.

On June 10, 1949, three fellow prisoners stabbed another prisoner to death. The petitioner, Lee, took no part in the incident, and, in fact, attempted to prevent it as shown in the dying victim's declaration which is attached as an exhibit in the record of the court-martial. Nevertheless, the petitioner was tried by Army General Court-Martial on September 13, 1949, along with the three active participants, and was convicted and sentenced to death.

The death sentence which had been adjudged against petitioner was commuted to life imprisonment, to begin to run consecutive upon completion of his then existing sentence. On January 27, 1953, appellant, Lee, became eligible for parole from his twenty-year sentence, but he was not considered for such parole because the first sentence of twenty years had merged with the second sentence to make one life sentence, and hence to deprive the United States Board of Parole of jurisdiction until 1957.

On October 18, 1954, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. An order was entered on October 22, 1954, dismissing appellant's petition as premature (R. 4). An appeal was taken from such order and was heard before the United States Court of Appeals for the Ninth Circuit on July 28, 1955. On September 14, 1955, the Court of Appeals rendered an opinion affirming the order of the lower court, to the effect that appellant's petition was premature. *Lee* v. *Swope*, 225 F2 674 (R. 6). A petition for a writ of certiorari was filed with the United States Supreme Court on December 30, 1955, appealing from such order. On February 7, 1956, certiorari was denied (R. 7). On September 20, 1956, the Army Clemency Board remitted the unexpired portion of the petitioner's first sentence so that he became imprisoned under the life sentence which is here being attacked.

On October 15, 1956, petitioner again filed a petition for a writ of habeas corpus, wherein he challenged the jurisdiction of the Army General Court-Martial which convicted him on December 13, 1949. On January 23, 1957, the District Court ordered that the issuance of a writ of habeas corpus be denied (R. 28). Appeal was taken from such order and was heard before the United States Court of Appeals for the Ninth Circuit on July 9, 1957. On October 11, 1957, the Court of Appeals rendered an opinion affirming the order of the District Court, denying petitioner's application for a writ of habeas corpus (R. 40).

A petition for certiorari to the Supreme Court of the United States was filed December 10, 1957, and certiorari was granted on March 17, 1958 (R. 41).

Summary of Argument

The argument hereinafter set forth is divided into two general parts. The first argument is entitled "The Constitutionality of Article of War 2(e)". It is the contention of your petitioner that though he was a military prisoner at the time of his court-martial, he was not amenable to court-martial jurisdiction for a capital offense and that Article of War 2(e), Appendix A, purportedly conferring such jurisdiction, is unconstitutional in that petitioner, having been discharged from the military, was no longer a member of the land and naval forces, but was a member of the civilian class and thus entitled to the guarantees under the Fifth and Sixth Amendments of the United States Constitution.

The second argument is entitled "Time of Peace". In the 92nd Article of War, Appendix B, the Congress deprived the military of jurisdiction over murder committed within the geographical limits of the United States in time of peace. It is your petitioner's contention that his court-martial for murder at Camp Cook, California, in 1949 was in time of peace; that the Congress, in enacting the 92nd Article of War, intended the term "time of peace" in its common and ordinary meaning, rather than in its technical meaning, and that the United States was in "time of peace" in September of 1949.

ARGUMENT

Constitutionality of Article of War 2(e)

Article of War 2(e) provides that among the persons subject to military law are "all persons under sentence adjudged by courts-martial". This article in its present form was first enacted in August 29, 1916 (39 Stat. 650), by the 64th Congress. It was carried over verbatim into the revision of the Articles of War by the 66th Congress on June 4, 1920 (41 Stat. 787), and by the 80th Congress on June 24, 1948 (62 Stat. 627).

The first Articles of War were the Revolutionary Articles of War of 1776. These articles were adopted by reference by the Continental Congress in 1786 and by the First Congress in 1790 (First Congress, Second Session, Ch. 10, Sec. 13). The Articles of War enacted in 1806 were substantially a verbatim re-enactment of the Revolutionary Articles.

The Articles of 1806 make no provision relating to jurisdiction by the military over discharged prisoners. In fact, the only articles of these original Articles of War relevant to in personum jurisdiction are Article 60 (2 Stat. 366) and Article 96 (2 Stat. 371). Article 60 provides:

> "All sutlers and retainers to the camp and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war".

Clearly, under this article the military would have no jurisdiction over a discharged prisoner, as such prisoner could hardly be said to be "serving with the armies of the United States in the field".

Article 96 provides:

"All officers, conductors, gunners, matrasses, drivers, or other persons whatsoever, receiving pay, or hire, in the service of the artillery, or corps of engineers of the United States, shall be governed by the aforesaid rules and articles, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers of the other troops in the service of the United States".

Since a discharged soldier serving sentence is not receiving pay nor in the hire of the army, he could not be held amenable to military jurisdiction under this article.

The next enactment of the Articles of War dealing with jurisdiction were in the Revised Statutes of 1873 by the 43rd Congress (Title XIV, Ch. 5). In this chapter the Congress completely revised the Articles of War. The only two articles dealing with such jurisdiction were Articles 63 and 64. Article 63 contained substantially the same provisions as Article 60 of the Articles of War of 1806; Article 64 provides:

"All officers and soldiers of any troop, whether militia or others, mustered and in pay of the United States, shall at all times and in all places be governed by the Articles of War and shall be subject to trial by court-martial."

However, on March 3, 1873, Congress enacted legislation which was not a part of the Articles of War, setting up the military prison at Rock Island (17 Stat. 548; Title XIV, Ch. 6) and Section 1361 thereof provides as follows:

"All persons under confinement in said military prisons undergoing sentence of courts-martial shall be liable to trial and punishment by courts-martial under the

Articles of War for offenses committed during said confinement".

Thereafter, Congress enacted similar legislation setting up the military prison at Fort Leavenworth, Kansas, and similarly provided for military jurisdiction over military prisoners (18 Stat. 48; 186).

The first attacks on military jurisdiction over discharged prisoners were cases involving persons who were tried under the provisions of the above mentioned sections.

The first of these was that of *Ex parte Wildman*, Fed. Case No. 17,653a, decided in 1876 by Judge Foster, United States District Judge for the District of Kansas. In this case the petitioner was court-martialed for an escape from Fort Leavenworth where he was serving sentence as a discharged prisoner. The District Judge held that the military had court-martial jurisdiction and denied the writ. An appeal from this decision to the United States Supreme Court was prevented by a final successful escape by the petitioner.

The next case dealing with this situation was that of *In re Craig*, 70 Fed. Rep. 969. This case was tried before a Circuit Judge for the District of Kansas on June 6, 1895. Petitioner had been convicted of desertion and sentenced to a "dishonorable discharge from service and to confinement at hard labor in Leavenworth Military Prison for a term of two years and six months". While serving this sentence petitioner "assaulted" the commanding officer "with intent to kill". He was court-martialed and sentenced to ten years. The petitioner, relying on the Fifth Amendment, contended that Section 1361 was unconstitutional; that since he had been discharged from the army prior to his second court-martial, he was a civilian and entitled to the guarantees of the Fifth Amendment. The Circuit

Judge, in upholding the constitutionality of Section 1361, stated in part:

> "If a reasonable doubt exists as to whether an act of Congress is constitutional or otherwise, the inferior courts of the United States will give effect to its provisions until it has been held to be void by the court of last resorts."

It does not appear that an appeal was taken from this decision. Therefore, since the court's ruling on the issue was at least partially based on the premise that it could not rule otherwise until the Supreme Court had ruled on the constitutional issue, it is of little value in resolving our problem.

These and subsequent cases dealing with military jurisdiction over discharged prisoners cite the case of *In re Bogart,* 2 Sowy. 396, Fed. Case No. 1596, decided by the Circuit Court in California in December of 1868. This case did not deal with jurisdiction over a discharged military prisoner, but dealt with military jurisdiction over servicemen who were discharged after commission of a military offense. Though there was some dispute as to whether the petitioner had been effectually discharged, the case was similar factually to the recent Supreme Court case of *U. S. ex rel. Toth* v. *Quarles,* 350 U.S. 11. Petitioner contended that the military lost jurisdiction by discharging him; that the mere fact that the offense occurred while he was in the service did not give the military the jurisdiction to try him after such discharge. The court held that since the offense "arose" while the petitioner was in the land and naval forces there was courts-martial jurisdiction over him, even though he was separated from the service prior to charges being preferred. Since this case did not deal with jurisdiction over a discharged prisoner and since its holding has since been overruled by the *Toth* case, *supra,*

it is of no value to us in determining the issues in the instant case.

During this period a Colonel W. Winthrop was serving as Assistant Judge Advocate General of the Army. In such capacity, in 1895 he wrote the final revision of his *"Digests of Opinions of the Judge Advocate General of the Army"*. The first of these digests prepared by Colonel Winthrop appeared in 1865. It was supplemented periodically with selected opinions rendered by Judge Advocate Generals from that date until the publication of the final edition in 1895. The scholarly learning of Colonel Winthrop in the field of military law is so renowned that he has since been referred to by the Supreme Court as "an expert on military jurisdiction" and the "Blackstone of Military Law".

Colonel Winthrop's great wisdom in the field of military law is borne out by his writings in the above mentioned digest. In the 1895 edition of his digest, commencing on page 323, he discusses various persons who are, and those who are not, subject to courts-martial jurisdiction. In the first subparagraph of paragraph 5 he arrives at the same conclusion as the Supreme Court in the case of *Toth* v. *Quarles, supra.* In the remaining subparagraphs of paragraph 5 his conclusions are the same as the Supreme Court in *United States ex rel. Hirshberg* v. *Cooke,* 336 U.S. 210. In numbered paragraph 6 his conclusion is the same as the Supreme Court in *Carter* v. *McClaughry,* 183 U.S. 365. In numbered paragraph 7 the Colonel arrived at the same conclusions as the majority and the concurring majority in the recent Supreme Court case of *Reid* v. *Covert* and *Kinsella* v. *Krueger,* 354 U.S. 1.

Colonel Winthrop's perception in this field of law becomes of added significance when it is considered that he wrote this Digest many years prior to most of the above cited decisions.

In the paragraph numbered 8, Colonel Winthrop deals with the issue presently before this Court. The Colonel states as follows:

> "Any statute by which any class of civilians is attempted to be made amenable to trial by court-martial for offenses committed while civilians and in time of peace, is necessarily unconstitutional, XLII, 250. Thus held that Sec. 1361, Rev. Sts., could not properly be construed as applying to prisoners at the Leavenworth Military Prison who had been sentenced to be dishonorably discharged in connection with their confinement, and as a preliminary thereto, and whose discharge had duly taken effect; that to interpret such provision as intended to include and apply to a class of prisoners no longer in the military service, but become civilians by discharge therefrom, while not a construction made necessary by the terms of the statute, was to attribute to Congress an unconstitutional enactment, and therefor inadmissible. So, in several cases of prisoners thus confined at this prison as civil convicts after discharge, and sought to be brought to trial for escape or attempt to escape, insubordination, assault, etc., committed while so confined,—held that the accused were not amenable to trial by court-martial, but, (unless their offenses were cognizable by the civil courts,) were legally punishable only by being subjected to the discipline of solitary confinement prescribed by Sec. 1353, Rev. Sts., for convicts disobeying orders or violating the regulations of the institution. XXXVII, 214; XLI, 293, 322; XLII, 132, 155, 249".

By footnote, Colonel Winthrop notes that the District Judge in *Ex parte Wildman, supra,* arrived at a contrary conclusion. However, he also notes that "with these opin-

ions of the Judge Advocate General's Office has never been able to concur . . .".

Returning to the legislative enactments in this field, the Congress, on June 18, 1898 (30 Stats. 484, C. 469, Sec. 5), enacted the following statute:

> "Soldiers sentenced by court-martial to dishonorable discharge and confinement shall, until discharged from such confinement, remain subject to the Articles of War and other laws relating to the administration of military justice."

It was while this statute was in effect that the Supreme Court decided the case of *Carter* v. *McClaughry* (1906), 183 U.S. 365. The *Carter* decision was one of the major decisions relied upon by the lower court in denying the writ. Carter was a captain in the army and was tried and convicted by court-martial on four charges (conspiracy to defraud, causing a false report to be made, conduct unbecoming an officer and embezzlement). He was sentenced to a dismissal, fined and imprisoned for five years. In his petition to the United States Supreme Court, Carter gave as his fourth assignment and error, "that the punishment and fine and imprisonment were illegal because *inflicted* after Captain Carter had ceased to be an officer of the army". (Emphasis added.)

It appears that the theory of this assignment of error was that when the President approved that portion of Carter's sentence adjudging a dismissal, it deprived the military of jurisdiction to carry out the remainder of the sentence, viz., confinement and fine. In answer to this argument the Supreme Court held:

> "The accused was proceeded against as an officer of the army and jurisdiction attacked in respect of him as such, which included not only the power to hear

and determine the case but the power to execute and enforce the sentence of the law."

The court then went on to make the following statement which has often been quoted, and which is strongly relied upon by the respondents in this case:

> "He was a military prisoner though he had ceased to be a soldier; and for offenses committed during his confinement, he was liable to trial and punishment by court-martial under the rules and articles of war."

It is submitted that this last mentioned general statement was either dicta or not intended by the Supreme Court to have the broad general interpretation which it has subsequently been given.

The holding of the court in the *Carter* case is not in conflict with your petitioner's argument. Your petitioner was not "proceeded against as an . . . [enlisted man] . . . of the army", but as a person who had been discharged from the army some two years prior to the convening of the court-martial, the jurisdiction of which he is attacking.

The petitioner in the *Carter* case admitted that the court-martial had jurisdiction over his person at the time the court was convened. At page 381 the court states:

> "Jurisdiction over the person is admitted but it is argued that there was not jurisdiction over the subject matter".

In reading the *Carter* opinion, it is apparent that it was Carter's contention that the military lacked power to carry out the sentence of the court-martial after it had executed that portion of such sentence adjudging a dismissal. It is noted that the court, at page 382, states:

"The different provisions of the sentence took effect concurrently while the accused was under the control of the military authorities of the United States as a Commissioned Officer of the United States Army. The date of the order of dismissal, of the infliction of the fine and of the beginning of the imprisonment, were the same date".

It is submitted that the *Carter* decision should be limited to the holding that was intended—the holding that was intended was that once a particular court acquires valid jurisdiction, that jurisdiction continues not only to the end of the trial but also until its sentence has been carried out. *Coleman* v. *Tennessee*, 97 U.S. 509; 14 *Am. Jur., Courts, Section* 195; *Manual for Courts-Martial, 1951*, Para. 11d.

It is interesting to note that the United States Court of Military Appeals recognizes the distinction between the *Carter* decision and the contention of your petitioner. In the recent case of *U. S.* v. *Speller*, 1947, 24 C.M.R. 173, the court was dealing with an accused who was released from the service administratively after his conviction by court-martial, but before the completion of appellate review. The court quoted all of the above language of the *Carter* case, including the language from the *Carter* case quoted by the court below in denying your petitioner's writ. However, the Court of Military Appeals quoted this language from the *Carter* case as standing for the proposition that jurisdiction having attached by commencement of action with a view to trial, continues for all purposes of trial, sentence and punishment. After citing the *Carter* and other decisions, the Court of Military Appeals went on to state:

"While it is true that when a serviceman's relationship with the military service has been terminated and he

reverts to his civilian status, the service to which he belonged has lost jurisdiction to initiate criminal proceedings against him, it does not follow that matters in the process of appeal must be dismissed. After the service relationship terminates, if the offender is to be tried for an offense committed prior to his return to a civilian status, he must be tried in a civilian court. That is what Toth v. Quarles, 350 U.S. 11, 100 L.Ed. 8, 76 S.Ct. 1, holds and, pretermitting unusual circumstances not presently facing us, we do not believe the method by which the termination is accomplished makes one whit of difference. But that is not to say that once an accused is tried and convicted by a court-martial which had jurisdiction, his reversion to a civilian status sets aside his conviction and requires that he be given a second chance before a jury in a civilian court. On the contrary, once a prosecution starts legally in military courts, it is entitled to be completed in the manner provided by the law which governs them."

Judge Quinn, in dissenting, stated:

"As far as I have been able to determine, the view that court-martial jurisdiction survives a discharge appears to be based upon a passage in the opinion of the United States Supreme Court in Carter v. McClaughry, supra."

"The quotation from the Carter case is too narrow a ledge upon which to support the claim of continuing jurisdiction where there has been an actual discharge not as a result of a court-martial sentence. Both cases cited by the Supreme Court are cases in which the regular period of service had apparently expired, but no valid discharge had been issued before the completion of the court-martial proceedings. As a matter

of fact, Coleman v. Tennessee, 97 U.S. 509, 24 L.Ed. 1118 (1879), supports the view that, had a valid discharge been issued, the court-martial's sentence could not legally be executed".

Your petitioner has no quarrel with the holding in the *Carter* decision. In his case, your petitioner argues that the court-martial which tried him at Camp Cook, California, never acquired jurisdiction over his person in the first instance.

Subsequent to the *Carter* case the Congress, in 1916, enacted Article 2(e), *supra*, in its present form, bringing the statute, for the first time, within the Articles of War.

There are several interesting factors to be noted in this growth of court-martial jurisdiction over discharged prisoners. Prior to the enactment of Section 1361, *supra*, it appears that there was no jurisdiction over such persons. After the enactment of Section 1361, such jurisdiction, if it did exist, was limited strictly to such prisoners confined at Leavenworth and Rock Island. In *G.C.M.O. 4 War Department, 1871*, the Secretary of War held that Section 1361 applied only to military prisoners held in confinement at Leavenworth. The Secretary declared inoperative a court-martial sentence received by a discharged prisoner who had escaped from Alcatraz Island.

In the face of repeated holdings by the Judge Advocate General and the Secretary of War that there was a constitutional defect in such enactments, the Congress, in 1898, expanded the jurisdiction from certain designated *military* prisons to *all* prisons. In its present form, Article 2(e) subjects all persons serving sentence under court-martial conviction to court-martial jurisdiction, regardless of the offense and regardless of the prison. Thus, a person in a position such as your petitioner who is now serving a

court-martial sentence in a federal *civilian* prison could be taken from such prison and tried for any of the offenses enumerated in the Uniform Code of Military Justice. For example, suppose a prisoner serving a court-martial sentence at Alcatraz were to kill another prisoner. If the local authorities so desired, he could be turned over to the military for courts-martial and tried without the benefits of his constitutional guarantees.

An examination of the Congressional reports prior to the 1898 enactment of the predecessor to Article 2(e) indicate that Congress did not intend by this statute to give to the military jurisdiction to try discharged prisoners for civilian capital offenses. From reading such reports, it is obvious that what Congress intended was to give the military jurisdiction to try prisoners for infractions of prison rules. As an example, see U. S. 3465 House Report No. 2132, 54th Congress, First Session, at page 2, which states:

> "Section 4 of the bill is new, its purpose being to provide by affirmative enactment that soldiers sentenced by courts-martial to dishonorable discharge and confinement shall, until discharged from such confinement, remain subject to the Articles of War and other laws relating to the administration of military justice. The necessity for such an enactment seems obvious. It avoids any conflict as to jurisdiction between the civil and military authorities in case the convict should, during his term of imprisonment, commit some other crime rendering him liable to further punishment. The probability would be that any offense so committed would affect the military establishment and be a breach of military discipline rather than purely a violation of the laws enforcible by civil authority."

In U. S. 3662, House Document No. 119, 55th Congress, Second Session, the Secretary of War, in a letter to the Committee on Military Affairs, stated at page 3:

> "There is, however, no law which subjects them [discharged prisoners] to the discipline of trial by court-martial under the Articles of War, and an important means of making confinement an effective military punishment is, therefore, lacking. To announce to the prisoner that, no matter what he may do, he can not have the term of his confinement extended is a direct encouragement to insubordination and must impair the effect of military imprisonment as an exemplary punishment."

By such language, it is apparent that the authority sought by the military and the authority given by Congress, was similar to the authority vested in the warden of any civilian prison by other Federal Statutes (18 U.S.C.A. 4001; 18 U.S.C.A. 4042). That is, authority to maintain prison discipline by giving summary punishment without the necessity of a jury trial. For example, the Warden of Alcatraz can commit an inmate to solitary confinement without the necessity of first trying him in the Federal District Court. The exercise of such authority by the warden is not subject to review by the courts. (*Williams* v. *Steel*, 194 F2 32; *Henson* v. *Welch*, 199 F2 367.)

Subsequent to the 1916 enactment of Article 2(e) in its present form, the case most relied upon by the respondents was decided. The case of *Kahn* v. *Anderson*, 255 U.S. 1, was decided by the United States Supreme Court in 1921. This case allegedly held that the military had jurisdiction over discharged prisoners and that Article 2(e) was constitutional. However, it is submitted that insofar as the present issues are concerned, the holding in the *Kahn* case should not be controlling for the following reasons:

First, the holding in the *Kahn* case insofar as it relates to jurisdiction in the military to try discharged soldiers, is dicta. It does not appear that Kahn and his co-defendants

had ever been dishonorably discharged from the army. As stated in the decision at page 7:

> "It is contended that, either by implication resulting from the length of the sentences previously imposed and which were being suffered, or by assumption that there was a provision in the sentences to that effect, it resulted that the accused, by the convictions and sentences, ceased to be soldiers and were no longer subject to military law".

Thereafter, the court went on to make the statement cited by the lower court herein in denying your petitioner's writ, to wit:

> "*Even if* their discharge as soldiers had resulted from the previous sentences which they were serving, it would be here immaterial, since if they remained military prisoners they were for that reason subject to military law and trial by court-martial for offenses committed during such imprisonment". (Emphasis added.)

The court then cites *Carter* v. *McClaughry, supra,* as standing for this proposition. However, as indicated above, the issue here involved was not even before the court in the *Carter* case and therefore could not be decided by it.

From all that appears, the petitioner in the *Kahn* case was still an actual member of the land and naval forces at the time of his second court-martial; thus, the issue as to whether a fully discharged prisoner would be amenable to court-martial jurisdiction was not before the court.

Second, in any event, it is respectfully suggested that the *Kahn* decision should be reconsidered in the light of the more recent *Toth* and *Reid* decisions, *supra.* In reading the *Kahn* case, it does not appear that the court gave

to this important jurisdictional issue the extensive and exhaustive analyses which is demonstrated in the two more recent decisions. Nowhere in the decision does the court attempt to weigh the constitutionality of Article 2(e) in the light of the historical background of the Fifth and Sixth Amendments of the Constitution. (*Covert* v. *Reid, supra*); nor does the court appear to have measured the jurisdictional authority claimed against the loss of the right to a trial by jury (*Toth* v. *Quarles, supra*).

In passing, it should be noted that in the lower court's decision it is stated (R. 36):

> ". . . the Toth case specifically upheld Article of War 2(e)."

Presumably the lower court was referring to the fact that the Supreme Court, in *Toth* v. *Quarles, supra,* cited the *Kahn* case. In this regard, it is submitted that the court, in the *Toth* case, not having the issue before it, did not pass on the question of military jurisdiction over discharged prisoners. From a careful reading it would appear that the court, in the *Toth* case, in referring to the *Kahn* case, was merely summarizing prior decisions in allied fields, without affirming, distinguishing, repudiating, or even expressing an opinion in regard thereto.

Subsequent to the *Kahn* case there were a number of lower court decisions which the respondents contend upheld the constitutionality of Article 2(e). The next case subsequent to *Kahn* was *Mosher* v. *Hudspeth* (10th Cir., 1941), 123 Fed. 2d, 401. In this case petitioner, Mosher, was tried and convicted on May 24, 1920, for a murder committed on February 3, 1920, in Germany. He was sentenced to a dishonorable discharge and life in prison. While awaiting the approval of his sentence and before the discharge was executed, he escaped and committed a robbery. He was

tried and convicted by court-martial for these latter two offenses on June 20, 1920, prior to the actual execution of his dishonorable discharge on July 23, 1920. Since the offenses and the court-martial occurred prior to the execution of the dishonorable discharge, Mosher, like Kahn, was an actual member of the land and naval forces at the time of his court-martial. Therefore, the *Mosher* case, like the *Kahn* case, is readily distinguishable from your petitioner's case.

The court, in the *Mosher* case, did not rule upon the question of whether a discharged prisoner is amenable to court-martial jurisdiction. It merely stated, "military prisoners held for punishment under previous sentences are subject to military law and trial by court-martial for offenses committed during such imprisonment". The court then cited *Kahn* and other cases hereinabove set out.

In 1944 the 10th Circuit again heard the *Mosher* case on a second petition. *Mosher* v. *Hunter*, 143 Fed. 2d, 745. In the second petition the petitioner apparently sought to have the court fix the effective date of his dishonorable discharge and again alleged the lack of jurisdiction in the court-martial. The facts and holdings of the court are the same as they were in the earlier case. However, the court gives different dates as to the effective date of the dishonorable discharge. The extent to which the court went into the question of the constitutionality of Article 2(e) was to cite the *Carter*, *Kahn* and earlier, the *Mosher* decisions. Thus, this decision is of no more benefit to us than the earlier cases upon which its holding is based.

In 1948, a District Court in Pennsylvania decided the case of *Steel* v. *Humphrey*, 80 Fed. Supp. 745. Petitioner, Steel, was convicted by court-martial of murder and sentenced to a dishonorable discharge. "One day after the issuance of the discharge, petitioner was interned in a

United States Federal Penitentiary . . . on a military warrant, signed prior to his discharge . . .". Steel apparently contended that the issuance of his discharge terminated the remainder of his military sentence. This is substantially the same argument as was brought out in *Carter* v. *McClaughry, supra.* The court, in the *Steel* case, merely cited Article 2(e) and stated that petitioner was a prisoner serving sentence adjudged by a court-martial. This decision is readily distinguishable on the same basis as the *Carter* decision and can be sustained on the basis that once jurisdiction attaches it continues until the sentence adjudged has been carried out.

In *MacDonald* v. *Lee* (Fifth Cir., 1944), 217 Fed. 2d, 619, the petitioner was tried and convicted by court-martial in 1951 for "behaving while a military prisoner with disrespect toward his superior officer . . . and of offering violence against a superior officer . . .". The petitioner contended that this court-martial lacked jurisdiction on the basis that he had previously received a dishonorable discharge in 1947. Regarding the jurisdictional issue, the Fifth Circuit merely quoted the *Kahn, Mosher* and *Carter* decisions. Other than citing the language of these decisions and the provisions of Article 2(e), it does not appear that the court even weighed the constitutionality of the article. Thus, it would appear for our purpose that this decision is of little, if any, benefit.

From a reading of all of these cases, it does not appear that the question of jurisdiction of the military over a discharged prisoner charged with a capital offense has ever been decided. The decisions all either deal with non-capital offenses or are cases where there was no executed discharge.

With due regard for the foregoing historical background, the following argument is submitted as to the unconstitutionality of Article of War 2(e). The issue is as follows:

On the one side it is contended that Congress can enact a law authorizing the military to court-martial, for murder, a fully discharged prisoner, as Congress has authority to "make rules for the Government and Regulation of the Land and Naval Forces". Constitution Art. 1, Section 8, Cl. 14.

On the other hand, it is contended that Congress cannot constitutionally make such a law, as a discharged prisoner is no longer a member of the land and naval forces, but is a member of the civilian class and thus entitled to a presentment or indictment (Constitution, Art. 5), and to a trial by jury (Constitution, Art. 6), when charged with a capital offense.

It has been held that "The Constitution was written to be understood by the voter", and that, "its words and phrases were used in their usual and ordinary, as distinguished from their technical meaning". *U. S.* v. *Sprague*, 282 U.S. 716, 731.

It has also been held that "The term 'Land and Naval Forces' refers to persons who are *members* of the Armed Forces", *Reid, supra,* page 20. (Emphasis added.)

It has been stated that "The Fifth Amendment clearly distinguishes the military from the civil class . . . (and) recognizes no third class which is part civil and part mili tary", *Reid, supra,* page 19, F.N. 36. (Emphasis added.)

Since there can be no third class, is a dishonorably discharged prisoner a member of the clearly distinguishable military class, or a member of the clearly distinguishable civil class?

The Judge Advocate General of the Army has answered this question a number of times. For example, the Judge Advocate has held:

1. A dishonorably discharged prisoner cannot be tried for absence without leave under the 61st Article of War, as the character of the offense presumes a duty to be at an appointed place and a discharged ex-soldier is not in confinement because of any duty. He is in confinement because of compulsion alone. Dig. Op. JAG. April, 1946, Para. 419 (2) page 93.

2. A dishonorably discharged prisoner cannot be court-martialed for disobeying the order of a non-commissioned officer under the 6th Article of War, "since the accused was not a soldier at the time of the offense alleged. The offense is limited in its application to soldiers". Dig. Op. JAG 1912-40, Sec. 394 (2).

3. "Under the current policy of the War Department [1942], disciplinary barracks are entitled to special services equipment (purchased from appropriated funds) for the use of general prisoners confined thereat, but *not* discharged from the service. Such equipment may not be issued for the use of a general prisoner confined thereat with a dishonorable discharge executed, as such general prisoners are not members of the military forces of the United States".

4. A dishonorably discharged prisoner who is killed by the enemy is not in the status of a member of the military killed in action. "In the absence of restoration to the army by the Secretary of War . . . the accused was not in the military service at the time of his death. A dishonorably discharged soldier becomes a civilian even though retained in confinement under sentence of a general court-martial". S.P.J.A.G. 253, 26 June 1942, I Bull. J.A.G. 100.

Colonel Winthrop in his *Military Law & Precedent*, 2d, ed., 1920, has also answered this question. At page 424,

the Colonel, in dealing with the question of the authority in the military to confine a prisoner after imposing a dishonorable discharge, states:

> "The legality of such imprisonment consists in the fact that, after the discharge, the party is held confined not as a military prisoner, but as a *civilian* convict—as an offender against the laws of the United States under the sentence of a tribunal authorized by public statute to punish at discretion the offense committed". (Emphasis added.)

At page 433 Colonel Winthrop again answers the question. Here, the Colonel is dealing with the question of the "nature and authority for" a dishonorable discharge. He states:

> "This punishment corresponds to dismissal in the case of an officer, in that it expels the offender with disgrace from the army and remands him to status of a civilian".

Since there is no dispute but that petitioner was discharged from the service and in view of the above authorities, it seems contradictory to say that he was a member of the land and naval forces.

The court, in the *Reid* case, stated, quoting from Colonel Winthrop (footnote No. 38):

> "Can (the power of Congress to raise, support and govern the military forces) be held to include the raising or constituting and the governing nolens volens, in time of peace, as a part of the army of a class of persons who are under no contract for military service . . . who render no military service, perform no military duty, receive no military pay, but are and remain civilians in every sense and for every capacity

> . . . in the opinion of the author, such a range of control is certainly beyond the power of Congress under (the Constitution)."

If the wife of a serviceman is not amenable to military jurisdiction because she is a civilian, then how can a discharged prisoner be made amenable to military jurisdiction? The prisoner, like the dependents, in *Reid* v. *Covert, supra,* is "under no contract for military service", as his contract with the service has been expressly repudiated by the service. The prisoner, like the dependents, "renders no military service, performs no military duty and receives no military pay". Such a discharged prisoner, like the dependents, "lives with servicemen on a military base", however, according to the Constitution's reasoning, this is insufficient basis to classify a prisoner as a person who is a "member" of the land and naval forces. As stated by this court in *Reid* v. *Covert, supra*:

> "In the light of this history, it seems clear that the founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were 'necessary and proper' for the regulation of the 'land and naval forces'. Such a latitudinarian interpretation of these clauses would be at war with the well established purpose of the founders to keep the military strictly within its proper sphere, subordinate to civil authority. The constitution does not say that Congress can regulate 'the land and naval forces and all other persons whose regulation might have some relationship to maintenance of the land and naval forces'. There is no indication that the founders contemplated setting up a rival system of military courts to compete with civilian courts for jurisdiction over

civilians who might have some contract or relationship with the armed forces. Courts-martial were not to have concurrent jurisdiction with courts of law over non-military America".

The lower court's reasoning as to your petitioner's status; that is, as to whether he was a member of the land and naval forces, is as follows:

"The technical dishonorable discharge constituted a severance from the military for certain purposes, including the deprivation of various benefits, but it is unthinkable to regard it as a vitiation of all military authority over the petitioner" (R. 38).

The court then went on to cite *Mosher* v. *Hunter, supra,* which has previously been discussed in this brief.

In the first instance, it should be noted that there was nothing technical about petitioner's dishonorable discharge. It was adjudged by a general courts-martial, approved by the President, fully executed and in hand delivered to petitioner. It fully and finally deprived him of all his rights and benefits as a member of the armed forces. Secondly, it is not contended by your petitioner that this discharge vitiated the military of all authority over him. Petitioner's only contention is that such discharge vitiated the authority in the military to try him for a capital offense committed within the continental United States, without the benefit of his constitutional guarantees. Your petitioner will freely admit that the military retained certain authority over him, including certain disciplinary authority, so long as he was confined in a military prison. But such authority is the same authority which the warden of any civilian prison has over civilian inmates of such prison.

The implication of the lower court's ruling is that the necessity of the situation, creates a "third class which is

part civil and part military". However, the court in the *Reid* case held that mere expedience or convenience is no justification for a denial of a basic constitutional right, and implied that there is no such third class.

It would seem that military jurisdiction should be limited to the least necessary for the occasion. Considering the language of the Supreme Court in the *Toth* case, as to the high regard for the right to a trial by jury, what was the overwhelming necessity which compelled the court-martialing of your petitioner for a capital offense occurring within the continental United States in 1949? What compelling necessity precluded the military from delivering him to the local Federal District Court for trial by jury in the tradition that existed in such matters at the time of the adoption of our Constitution?

Time of Peace

The 92nd Article of War provides that the military cannot try a person for "murder or rape committed within the geographical limits of the United States in time of peace", 10 U.S.C. 1564. Your petitioner was tried for murder at Camp Cook, California, on June 10, 1949; the issue is whether June 10, 1949, was "time of peace" as the term is used in the 92nd Article of War. The Court of Appeals held that such date was not "time of peace". The court based its holding on the case of *Kahn* v. *Anderson, supra,* which stated that time of peace meant "peace in the complete sense, officially declared". From this, the Court of Appeals reasoned that we did not arrive at "time of peace" after World War II until the signing of the German and Japanese Peace Treaties in 1951. (65 Stat. 451, 66 Stat. C3, 66 Stat. C31, 67 Stat. C24.) Thus, it is the lower court's opinion that despite the actual condition of peace or war, the determining factor is the technical existence or nonexistence of war, dependent upon whether a peace

treaty has been signed. That such is not the rule is demonstrated by a close examination of the cases in which the Supreme Court and the United States Court of Military Appeals has been called upon to interpret statutes which contain the words, "in time of peace" and "in time of war".

It is the contention of the appellant that the determination of the existence of the state of war, in interpreting a particular statute, must be based upon the consideration of a number of factors in the light of the Congressional intent, or the reason behind the particular statute; that no one event, such as a treaty of peace can be said to be the determining factor for the termination of war in the interpretation of all statutes. In this regard, see *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, wherein the court states:

> "Assuming that the implied power to enact such a prohibition must depend not upon the existence of a technical state of war, terminable only with the ratification of a treaty of peace or a proclamation of peace (United States v. Anderson, 9 Wall. 56, 70; The Protector, 12 Wall. 700, 702; Hijo v. United States, 194 U. S. 315, 323), but upon some actual emergency or necessity arising out of the war or incident to it, still, as was said in Stewart v. Kahn, 11 Wall. 408, 507, "The power is not limited to victories in the field and the dispersion of the [insurgent] forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress".

The heart of the *Hamilton* decision is contained on page 163 of the decision wherein the court states:

> "In view of facts of public knowledge, some of which have been referred to, that the treaty of peace has not

yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that it cannot even be said that the manpower of the nation has been restored to a peace footing, we are unable to conclude that the act has ceased to be valid."

This *Hamilton* case is the case most frequently used by the Supreme Court and other courts in determining what constitutes "time of peace" and "time of war". From the above language of the court, it is readily apparent that the court, in determining such "time of war", considers a number of factors in the light of the particular statute being interpreted. The rule is not as the lower court would have us believe, that "time of war" is only terminated on the formal declaration by the President. Perhaps the clearest statement of the rule is that of Justice Black, in his dissent in *Ludecke* v. *Watkins*, 335 U.S. 160 at 173:

"But this 1798 Statute, unlike statutes passed in later years, did not expressly prescribe the events which would for statutory purposes mark the termination of the 'declared' war or threatened invasions. See Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 165 n. 1. *In such cases we are called on to interpret a statute as best we can so as to carry out the purpose of Congress in connection with the particular right the statute was intended to protect,* United States v. Anderson, 9 Wall. 56, 69-70; The Protector, 12 Wall. 700, 702, or the particular evil the statute was intended to guard against. McElrath v. United States, 102 U.S. 426, 437, 438. See Judicial Determination of the End of the War, 47 Col. L. Rev. 255." (Emphasis added.)

That this is the rule is conceded by the majority in the *Ludecke* case, wherein they state:

"The state of war *may* be terminated by treaty *or* legislation *or* Presidential Proclamation". (Emphasis added.)

Here, the majority is stating that any one of these three things *may* herald the end of war. They do not hold that any one of them must, or necessarily does, mark the end of war. The majority goes on to pose the precise question which is involved in appellant's case:

"Whether and when it would be open to this court to find that a war, formally kept alive, had, in fact, ended, is a question too fraught with gravity even to be adequately formulated when not compelled".

The court goes on to quote the above language used by the court in the *Hamilton* case, *supra*, to the effect that a number of factors are considered in determining when a war terminates.[1]

This interpretation of "end of war" is in accord with the findings of the United States Court of Military Appeals. See *U. S.* v. *Gyers*, 15 C.M.R. 220, wherein it was held:

". . . Finally, in view of the fact that the phrase 'time of war' appears in several distinct Articles in the Uniform Code, supra—e.g., Articles 43, 90 and 106—we are constrained to point out that its meaning, as it may be used in any particular Article, must be determined with an eye to the goal toward which that Article appears to have been directed. This cautious and individualized approach toward Articles of the Code—far from being incongruous—seems dictated by the precedent of Congressional intent in dealing with the problems of World War II".

[1] See discussion in this regard in 47 Col. L. Rev. 225.

Regarding the other cases cited by appellee; namely, *Knauff* v. *Shaughnessy*, 338 U.S. 138, and *Woods* v. *Miller Company*, 333 U.S. 138, it is to be noted that on the point here in issue (i.e. whether the war had ended), the court in the *Knauff* case cited the decision in the *Woods* case. Justice Black, in the *Ludecke* case had the following to say concerning the *Woods* decision, see footnote 4, page 178:

> "The court cites Woods v. Miller Company, 333 U.S. 138, as having held that the War with Germany has not yet terminated. I find no such holding in the opinion and no language that even suggests such a holding".

The bulwark of appellee's position as to "time of war" and "time of peace" can be found in the cases of *Kahn* v. *Anderson*, 225 U.S. 1 and *Givens* v. *Zerbst*, 255 U.S. 11. Both cases were decided on January 31, 1921. The issue as to what constitutes "time of peace" was one of several issues involved in each case. However, in neither case did the court delve extensively into the question nor seek to interpret the article in the light of Congressional intent, or the reason behind the article. In the *Kahn* case the court simply stated:

> "That complete peace in the legal sense had not come to pass by the affect of the Armistice and the cessation of hostilities is not disputed, Hamilton v. Kentucky Distilleries Co., 251 U.S. 376".

And the court further stated:

> "We are of the opinion that qualification signifies peace in the complete sense, officially declared".

It is to be noted that the court cites the *Hamilton* case. The *Hamilton* case, as above noted, indicates that the termination of a state or war depends upon a number of

factors considered in the light of the reason for the statute or the Congressional intent behind the particular statute being interpreted.

A puzzling aspect of the *Kahn* case is what the court meant when it stated, "peace in the complete sense, officially declared". As noted in the majority opinion in the *Ludecke* case, *supra*:

> "A war *may* be terminated by treaty *or* legislation *or* Presidential Proclamation". (Emphasis added.)

Any one of these may be "peace, officially declared". In the instant case, would the official declaration of peace be the Presidential Proclamation of December 31, 1946 (12 Fed. Dig. 1), Cessation of Hostilities, or the Presidential Proclamation of April 28, 1952 (66 Stat. C. 31), or the Treaty in San Francisco with Japan on September 8, 1951, or the Presidential Proclamation of October 24, 1951 (66 Stat. C. 3), or the Peace Treaty with Germany, or the Joint Resolution of Congress of July 25, 1947 (61 Stat. 449), or any one of the numerous other legislative acts, treaties or Presidential Proclamations which occurred between 1945 and 1951. Each of these statutes, treaties and proclamations terminate the war for its own particular purpose. None of them expressly mentions Article of War 92. Therefore, it is submitted that the court must look to the reason for the enactment of Article 92.

Lastly, in regard to the *Kahn* and *Givens* cases, it is pointed out that both of these cases are clearly distinguishable from the instant case on their facts. Article of War 92 states, in part, as follows:

> "That no person shall be tried . . . for murder or rape committed . . . in time of peace." (Emphasis added.)

In the *Kahn* case, the offense was committed on July 29, 1918; the accused was placed on trial on November 4, 1918. In the *Givens* case the date of the offense is not shown; however, the court was convened on October 30, 1918. Therefore, it is to be noted that since not even the Armistice was signed until November 11, 1918, there is no question at all but that the offense was committed and the trial commenced in time of actual war. Therefore, the decision in the *Kahn* case can be sustained on an entirely different principle than that which the lower court attributes to it. The holding of the court in the *Kahn* case can be sustained on the same principle that the court laid down in the case of *Carter* v. *McClaughry, supra.* As previously noted the principle of the *Carter* case is that jurisdiction, once attached persists in the particular court until the completion of the trial and the carrying out of the sentence. In the *Kahn* case, the court-martial jurisdiction attached in time of actual war as the court was convened prior to the cessation of hostilities. Once this jurisdiction had attached it continued in existence until completion of the trial and the carrying out of the sentence. The cessation of hostilities and the signing of the Armistice in the middle of the trial did not vitiate the jurisdiction which had previously attached. It is interesting to note that the *Kahn* decision cites *Coleman* v. *Tennessee*, 97 U.S. 509. According to the *Carter* decision, the rule of the *Coleman* case is that once jurisdiction attaches it continues until the sentence is carried out. The principle of the *Carter* and *Coleman* cases, though applicable to the *Kahn* and *Givens* cases, is inapplicable to your petitioner's case. The court-martial in your petitioner's case was not convened until some four years after the cessation of hostilities and the signing of the surrender.

In the instant case, the Germans surrendered on May 8, 1945 (50 Stat. 1857), and the Japanese surrendered on

September 2, 1945 (59 Stat. 1733). The alleged offense did not occur until June 10, 1949, and the trial was not held until September 10, 1949. Can it be said that the Supreme Court in the *Kahn* and *Givens* cases would have reached the same result if the offense and court-martial had taken place some four years after the German Armistice?

In 1951 the Congress enacted the Uniform Code of Military Justice and set up a new system of Military Courts to try persons in the military. The highest of the Military Appellate Courts is the United States Court of Military Appeals. This "Supreme Court of the Military" has as its only function the interpretation of law as applicable to military personnel. Because such are the limits of this court's endeavors, its members have become imminently proficient in this field of law; therefore, great weight should be given their decisions. The Court of Military Appeals has dealt with the subject of "time of war" and "time of peace" on several occasions. The most recent cases are: *United States* v. *Shell*, 23 C.M.R. 110, decided on March 15, 1957, and *United States* v. *Busbin*, 23 C.M.R. 125, also decided on March 15, 1957. In the *Shell* case, *supra*, the court stated:

> "In holding that offenses committed during the Korean conflict were perpetrated during a time of war within the meaning of the language of the Code . . . we reasoned that war does not result only from a formal declaration by Congress, but can exist, in fact, without a declaration, *and that its existence is to be determined by the realities of the situation as distinguished from legalistic niceties.*" (Emphasis added.)

> "United States v. Bancroft, 3 U.S.C.M. 3, 11 C.M.R. 3; United States v. Gann, 3 U.S.C.M.A. 12, 11 C.M.R. 12; United States v. Ayers, 4 U.S.C.M.A. 220, 15 C.M.R.

220; United States v. Taylor, 4 U.S.C.M.A. 232, 15 C.M.R. 232. The factors which, considered collectively, compelled our finding of a time of war, are set out in Bancroft, supra, and its allied cases. Of crucial importance in all of the cases, however, was the existence of armed hostilities against an organized enemy".

"Manifestly, if, in the absence of formal Executive or Legislative action, a collection of factors compels a conclusion that a state of war is being maintained, when those factors or a substantial part thereof no longer exist, a contrary deduction may be required".

"We, therefore, hold that the Armistice in Korea on July 27, 1953, ended those actual hostilities essential to a finding of time of war, and hence that for the purposes of military law the state of war terminated on that date".

This case becomes of added significance, when it is considered that it overruled the prior military case of *United States* v. *Smith*, 17 C.M.R. 406, decided September 16, 1954. In the *Smith* case the Board of Review held that the Korean War was not ended by the Armistice of July 27, 1953 " . . . inasmuch as war ends only by treaty, legislation, or specific Presidential Proclamation. *United States ex rel Knauff* v. *Shaughnessy*, 338 U.S. 537; *Ludecke* v. *Watkins*, 335 U.S. 160; Kahn v. Anderson, 225 U.S. 1". (Emphasis added.)

In the *Busbin* case, *supra*, the court makes the same holding as in the *Shell* case. See also *U. S.* v. *Johnson*, 6 C.M.R. 810 and *United States* v. *Meadows*, 2 C.M.R. 306. In the instant case the court is called upon to decide what constitutes "time of war" and "time of peace" as these terms are used in a military code. In the *Shell* and *Busbin* cases, the highest of the military has decided that such terms,

when used in military law, constitute actual peace or war and not technical peace or war. To now decide that the military court erred in its interpretation of this language and to hold, as the lower court would suggest, that time of peace, as used in the Military Code, means technical peace, evidenced by a formal Presidential Proclamation, would be to raise havoc with all of the military decisions which have been based upon the reasoning as is evidenced in the *Shell* case.

The lower court attempted to distinguish the *Shell* case and the *Busbin* case on the grounds that they arose during the Korean conflict. The lower court's reasoning seems to be that since World War II was commenced by a proclamation, it could only be terminated by proclamation and that there was therefore no room for judicial interpretation as to such termination; conversely, it reasoned that since the Korean conflict was not commenced by proclamation, it was not necessary to terminate it by proclamation and therefore the Court of Military Appeals could indulge in interpretation and consider a number of factors in determining the end of war. According to the lower court, this was what was meant by the Court of Military Appeals when it stated:

> "In the absence of formal executive or legislative action . . . a collection of factors . . . "

That the Court of Military Appeals did not intend such a limited meaning to its decision is demonstrated by its language when it stated:

> "*. . . and that Congress, when it used the phrase in time of war in the Military Code, intended the phrase to apply to that state, regardless of whether it was initiated or continued with or without a formal declaration.*" (Emphasis added.)

The essence of the lower court's distinction of the *Shell* case is that there was an absence of political pronouncement after the Korean War. In answer to this, it need only be pointed out that there was an absence of a proclamation of peace for six years after World War II. Who is to say that there will be no proclamation of peace within six years after the Korean War?

If, in the light of the foregoing, it can be assumed that "time of peace" and "time of war" are technical terms which must be interpreted in the light of the Congressional intent involved in the particular statute being interpreted, the only remaining question is as to the Congressional intent behind the enactment of Article of War 92. That military courts are courts of special and limited jurisdiction is axiomatic. They have only such jurisdiction as is expressly conferred upon them. The Congress, in enacting the Articles of War, saw fit to withhold from the military courts jurisdiction over murder and rape committed within the continental United States in "time of peace". The obvious reason that Congress withheld such jurisdiction from the military is that the Congress was aware of the fact that persons tried by the military are not afforded many of the basic Constitutional guarantees that a person has when tried in a civilian court.[2]

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[2] That the Supreme Court has also recognized this is demonstrated by the language of the court in *Toth* v. *Quarles, supra;* "We find nothing in the history of Constitutional treatment of military tribunals which entitled them to rank along with Article 3 courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property . . ." "And, conceding to the military personnel the high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in Federal Courts".

The primary of these is the right to a trial by jury. The Congress obviously felt that when a person was being tried for a capital offense he should be afforded these basic Constitutional guarantees if it were at all practical.[3] The

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[3] See Footnote 20, *Toth* v. *Quarles, supra,* "The historical background of this country's preference for civilian over military was impressively presented in the argument of counsel and opinion of court in *Ex parte Milligan,* 4 Wall. 2, 121. And see *Duncan* v. *Kahanamoku,* 327 U.S. 304".

See also the following discussion between General Crowder and the Senate Committee, appearing in Senate Report, 64th Congress, First Session, pages 32 and 33:

"The General Staff has further revised the article so as to vest this jurisdiction in courts-martial, thus making the jurisdiction of the court-martial concurrent with the civil courts, as to both capital and noncapital crimes. I do not concur in this extension of the court-martial's jurisdiction, and the Secretary of War has expressed disapproval of the change in his letter transmitting this revision to the Congress."

"In other words, the General Staff has undertaken to say that capital crimes committed here at Fort Myer or anywhere else within the geographical limits of the country shall be tried as well by court-martial as by civil courts. We never have had that law, and I doubt very much whether it is desirable to divorce the Army to that extent from accountability in the civil courts. But I am very much in favor of doing it when the Army is outside of our geographical limits proper; and that is the proposition that I stand for, and not the proposition that is here submitted."

"The Chairman. What reasons do the General Staff assign?
Gen. Crowder. I have not seen any reason. They simply recorded a recommendation. I can easily understand the reason, viz., a desire that the Army may handle its own criminal business and doubtless border conditions to the south of us entered into their consideration and influenced their conclusions. I concede the necessity for autonomy in these matters when the Army is serving under unusual conditions, away from the protection of Constitutionally guaranteed rights."

"Senator Colt. Yes.
Gen. Crowder. But not when they are serving here. I think that here in the United States proper the Army should be under the same accountability as civilians for capital crimes."

"Senator Colt. That runs all through the common law, the civil law, in regard to capital crimes, I think. Of course I can understand that the General Staff perhaps would like to take all the power they could in a court-martial."

Congress was aware of the fact that in certain instances it would not be practical to compel the military to allow one of its members to be tried in a civilian court.[4]

The instances when Congress concluded that such would be impractical were when the offenses occurred outside the geographical limits of the United States or when the offenses occurred within the States of the Union, but, when due to war, the local courts were closed.[5] The impracticability of a civilian trial in such instances is obvious.

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[4] See Senate Reports, 63rd Congress, Second Session, General Crowder, the Judge Advocate General stated at page 98:

"It will be noted that under the existing law—articles 58 and 62—courts-martial have no jurisdiction over capital crimes in time of peace. My proposition, explicitly stated, is to give courts-martial jurisdiction of the only two crimes made capital by the new penal code of the United States, viz., murder and rape, when committed by persons subject to military law in our foreign possessions, leaving these crimes to be tried by civil courts when committed within the geographical limits of the States of the Union and the District of Columbia. Under the present condition of the law, if one of our soldiers stationed in the Philippines commits a capital offense there, he goes before a court consisting of a single judge, to be tried for his life, and in a majority of cases it will be a native judge. The soldier will be tried under a code which has not been Americanized in all respects and by a court administering what is essentially an alien jurisprudence".

On page 99, the General stated:

"Gen. Crowder. Within the United States and the District of Columbia capital crimes will continue to be punished by the civil courts under lines 4, 5, and 6. The new article giving authority to courts-martial to try these crimes is operative only in our foreign possessions; the language of the article would make it operative in Alaska. I do not insist upon Alaska being included, but I think as long as conditions there are unsettled there would be some propriety in providing that soldiers stationed there should be tried for these offenses by their own officers. It is not however, a provision that I would insist upon".

[5] See argument of David Dudley Field, counsel for petitioner *Ex parte Milligan, supra;* in his argument, Mr. Field cites a num-

However, we can assume, in light of the fact that it was only comparatively recently that Congress granted to the military the authority to try a soldier for any civil crime,[6] that Congress only grudgingly granted to the military this limited jurisdiction over civil capital offenses. Considering the background referred to in the above footnote, it is safe to assume that Congress, in granting this limited jurisdiction over civil capital offenses, was dealing with realities and not technicalities. Surely Congress did not intend that a mere technical or fictional state of war[7] would deprive the soldier of the basic Constitutional guarantees to which he would be otherwise entitled. It would not seem that a fictional or technical state of war should be allowed to protect the evil that Congress sought to guard against, nor defeat the right that Congress sought to protect.

---

ber of early English authorities to the effect that when the civilian courts are open it is time of peace in judgment of law.

Also, see Congressional Record prior to the enactment of the 1916 Articles of War, which included the 92nd Article, here involved—Senator Cummings, in a discussion involving military jurisdiction over offenses occurring within the continental United States and the authority in time of peace and in time of war, states:

> "I have no knowledge about the subject at all; but I should be very sorry to see the civil courts supplanted in time of peace by courts-martial where the civil courts are open and prepared to try and acquit or convict, as the case may be". Congressional Record, Vol. 53, pt. 11, 64th Congress, First Session, July 6-24, 1916, p. 11511.

[6] See *Covert, supra,* pg. 23 to pg. 32 for historic preference of civil over military trials and the grudging manner in which the military was granted jurisdiction over any civil crime. See also *Toth* v. *Quarles,* 350 U.S. 11, pg. 22.

[7] Justice Black, in his dissent in the *Ludecke* case, *supra,* at pg. 175, has this to say of the situation as it existed on June 21, 1948: "I think the idea that we are still at war with Germany, in the sense contemplated by the statute controlling here, is a pure fiction". And again in the same decision, pg. 178, "Of course, it is nothing but a fiction to say that we are now at war with Germany."

The Supreme Court, in the case of *Toth* v. *Quarles*, *supra*, stated:

> "Free countries the world over have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service".

Congress, in enacting Article of War 92, sought to restrict military tribunals from trying capital offenses, except when it was essential to the maintenance of discipline in time of actual war. What was the circumstance existing in 1949 which was so essential to the maintenance of military discipline that a soldier could not be tried in a civilian court as directed by Congress; or, to be more specific, what conceivable adverse effect could there have been upon army discipline to take the appellant 150 miles to the United States District Court for the Southern District of California to try him for the alleged capital offense?

CONCLUSION

That insofar as Article of War 2(e) authorized the trial of a dishonorably discharged prisoner for a capital offense, said article was unconstitutional. That the court-martial convened under the provisions of such article was unconstitutional when the offense charged was a capital offense. That therefore a writ of habeas corpus should issue, releasing petitioner from the confinement imposed by this void court-martial.

For the purposes of interpreting Article of War 92, the United States was at peace in 1949. That, therefore, the military lacked jurisdiction over the person and subject matter and its trial by court-martial was void. That, therefore, a writ of habeas corpus should issue, releasing

petitioner from the confinement imposed by this void court-martial.

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APPENDIX A

Article of War 2(e) (10 U. S. Code 1473)

ART. 2. *Persons Subject to Military Law.* The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law", or "persons subject to military law," whenever used in these articles; provided, that nothing contained in this Act, except as specifically provided in Article 2, subparagraph (c), shall be construed to apply to any person under the United States Naval jurisdiction unless otherwise specifically provided by law.

(e) All persons under sentence adjudged by courts-martial;

APPENDIX B

Article of War 92 (10 U. S. Code 1564)

ART. 92. *Murder—Rape.* Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct; provided, that no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

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No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOHN LEE, PETITIONER

v.

PAUL J. MADIGAN, WARDEN, FEDERAL PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes Involved	2
Statement	3
Summary of argument	5
Argument:	
I. Article 2 (e) of the Articles of War is constitutional	8
A. This Court has already held Article 2 (e) constitutional	9
B. If the Court reconsiders the problem, it should again sustain Article 2 (e)	13
II. Petitioner's offense was not committed "in time of peace"	33
A. This Court has already held that "time of peace" for the purpose of Article 92 does not exist until complete peace is officially declared	35
B. "Time of peace" for Article 92 still means complete peace officially declared, and that event did not occur with respect to World War II until April 1952	38
Conclusion	52

CITATIONS

Cases:

Carter v. *McClaughry*, 183 U. S. 365 ..... 18, 19, 20
Chastleton Corporation v. *Sinclair*, 264 U. S. 543 33
Coleman v. *Tennessee*, 97 U. S. 509 ..... 19, 34
Craig, In re, 70 Fed. 969 ..... 16, 18, 19
Duncan v. *Kahanemoku*, 327 U. S. 304 12
Dynes v. *Hoover*, 20 How. 65 35
Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146 .. 34, 38
Hurley v. *Crawley*, 50 F. 2d 1010 32

Cases—Continued

	Page
Johnson v. *Sayre*, 158 U. S. 109	34
Kahn v. *Anderson*, 255 U. S. 1	5, 7, 9, 10, 11, 20, 21, 22, 35, 36, 37, 38, 49
Knauff v. *Shaughnessy*, 338 U. S. 537	39, 46
Ludecke v. *Watkins*, 335 U. S. 160	34, 39, 40, 51
McDonald v. *Lee*, 217 F. 2d 619, certiorari granted and remanded with directions to dismiss as moot, 349 U. S. 948	23, 26
McElrath v. *United States*, 102 U. S. 426	38
Milligan, Ex parte, 4 Wall. 2	35
Mitchell v. *Cohen*, 333 U. S. 411	32
Mosher v. *Hudspeth*, 123 F. 2d 401, certiorari denied, 316 U. S. 670	22
Mosher v. *Hunter*, 143 F. 2d 745	22
Reid v. *Covert*, 354 U. S. 1	5, 10, 11, 12, 13, 34
Screws v. *United States*, 325 U. S. 91	38
Stewart v. *Kahn*, 11 Wall. 493	34
Toth v. *Quarles*, 350 U. S. 11	5, 10, 11, 12, 20, 23, 34
United States v. *Ayers*, 4 U. S. C. M. A. 220, 15 C. M. R. 220	49, 50
United States v. *Hendee*, 124 U. S. 309	32
United States v. *Mouat*, 124 U. S. 303	32
United States v. *Shell*, 7 U. S. C. M. A. 646, 23 C. M. R. 110	50
United States v. *Speller*, 24 C. M. R. 173	20
Wildman, Ex parte, 29 Fed. Case No. 617, 53a (D. Kan.)	16, 19, 31
Woods v. *Miller*, 333 U. S. 138	39
Yamashita, In re, 327 U. S. 1	34
Youngstown Sheet & Tube v. *Sawyer*, 343 U. S. 579	33

Constitution and Statutes:

U. S. Constitution:	
Article I, Section 8, Clause 14	8, 34
Fifth Amendment	8, 13, 34
Sixth Amendment	8, 13
Act of March 3, 1873, 17 Stat. 582, Section 12	14, 15, 16–18, 21
Act of June 18, 1898, c. 469, 30 Stat. 483	21, 28, 30

Constitution and Statutes—Continued
Page
Act of March 4, 1915, c. 143, Section 2, 38 Stat. 1085 (10 U. S. C. (1946 ed.) 1456) 24
Articles of War, as amended by Act of June 24, 1948, c. 625, 62 Stat. 604, Sections 202, 235 ..... 2, 31
2 (d), 48, 58, 59, 74–79, 104, 119 45
2 (e) (10 U. S. C. (1946 ed.) 1473 (e)) 2, 5, 8, 9, 13, 15, 23, 29, 30, 32
39 (10 U. S. C. (1946 ed.) 1510) 45
42 (10 U. S. C. (1946 ed.) 1513) 45
45 (10 U. S. C. (1946 ed.) 1516 ..... 29, 45
52 (10 U. S. C. (1946 ed.) 1524 30
53 (10 U. S. C. (1946 ed.) 1525) 47, 48
61 (10 U. S. C. (1946 ed.) 1533) 26
65 (10 U. S. C. (1946 ed.) 1537) 26
70 (10 U. S. C. (1946 ed.) 1542) 45
85 (10 U. S. C. (1946 ed.) 1557) 45
86 (10 U. S. C. (1946 ed.) 1558) 45
80, 81, 82 45
92 (10 U. S. C. (1946 ed., Supp. IV) 1564) 3, 7, 8, 33, 35, 37, 38, 43, 45, 46, 47, 48, 51, 52
Revised Statutes, Section 1361 21
18 Stat. 48 14
39 Stat. 650 31
41 Stat. 787 31
41 Stat. 1359 40
61 Stat. 449 45
61 Stat. 1048 44
66 Stat. C31 46
67 Stat. C24 47
Uniform Code of Military Justice, 10 U. S. C. 801, *et seq.*:
Article 2 (7) (10 U. S. C. 802) 8, 29
Article 56 29
Article 89 26
10 U. S. C. (1946 ed.) 1457 24
10 U. S. C. (1946 ed., Supp. IV) 1484 29
10 U. S. C. (Supp. V) 3662–3663 24
50 U. S. C. § 740 (1952 ed.) 48
Legislative Material:
59 Cong. Rec. 7747, 7805, 7808 40
60 Cong. Rec. 290 41
91 Cong. Rec. 8377 46

Legislative Material—Continued Page
91 Cong. Rec. 8380 46
Hearings before Subcommittee No. 4 of House Committee on Judiciary, on Cessation of Hostilities, Termination of the War and Emergencies:
79th Cong., 1st Sess. (1945) 42, 43
79th Cong., 2d Sess. (1946) 42
Hearings before the Subcommittee of the House Committee on Armed Services on H. R. 2575, To Amend the Articles of War, etc., 80th Cong., 1st Sess., 2121, (1947) 47
Hearings before Subcommittee No. 1 of the House Committee on Armed Services, Uniform Code of Military Justice, 81st Cong., 1st Sess., 1215 (1949) 48
H. J. Res. 327, 66th Cong., 2d Sess 40
H. J. Res. 382, 66th Cong., 3d Sess 40
H. Doc. 119, 55th Cong., 2d Sess., p. 3 ..... 21, 28, 44
H. Doc. 282, 79th Cong., 1st Sess 45
H. Ex. Doc. 61, 41st Cong., 2d Sess., pp. 1–3 14
H. Ex. Doc. 73, 42d Cong., 2d Sess 14
H. Ex. Doc. 19, 43d Cong., 1st Sess., p. 17 15
H. Rep. 70, 42d Cong., 2d Sess 14
H. Rep. 2132, 54th Cong., 1st Sess., p. 2 ..... 27, 29, 31
H. Rep. 224, 55th Cong., 2d Sess., p. 2 ..... 28, 31
H. Rep. 1111, 66th Cong., 3d Sess 40
H. Rep. 2682, 79th Cong., 2d Sess., p. 2 43
H. Rep. 799, 80th Cong., 1st Sess., App. p. 24 45
S. Doc. 42, 80th Cong., 1st Sess 44, 45
S. J. Res. 123, 80th Cong., Section 3 ..... 44, 46, 47, 50
S. Rep. 130, 64th Cong., 1st Sess., App 37, 44
S. Rep. 706, 66th Cong., 3d Sess 41
S. Rep. 339, 80th Cong., 1st Sess., Part 2 45
Miscellaneous:
1 Bull. J. A. G. 100 26
6 Bull. J. A. G., March–April, 1947, § 423 (1), p. 66 26
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12 Fed. Reg. 1 44
Library of Congress Legislative Ref. Serv. Pub. Aff. Bull. No. 35 (1945) 43, 45
16 Op. Atty. Gen. 292 21
32 Op. Atty. Gen. 505 41
Winthrop, *Military Law and Precedents* 105 (Reprint 1920 ed.) 21

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 33–40) is reported at 248 F. 2d 783. The opinion of the District Court (R. 28–31) is reported at 148 F. Supp. 23.

JURISDICTION

The judgment of the Court of Appeals was entered on October 11, 1957 (R. 40). The petition for a writ of certiorari was filed on December 10, 1957, and was granted on March 17, 1958 (R. 41). 356 U. S. 911. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a dishonorable discharge imposed upon a soldier by a previous court-martial sentence severs his connection with the military so as necessarily to deprive military tribunals of the jurisdiction provided by Article 2 (e) of the former Articles of War for offenses committed during confinement in a military disciplinary barracks by all persons under sentence adjudged by courts-martial.

2. Whether the limitation contained in Article 92 of the Articles of War, which deprived courts-martial of jurisdiction of the offense of murder committed in "time of peace," within the continental United States, was operative on June 10, 1949, the time petitioner committed the offense.

STATUTES INVOLVED

The pertinent provisions of the former Articles of War, as amended by the Act of June 24, 1948, c. 625, Sections 202, 235, 62 Stat. 604, 628, 640, provide as follows:

> ART. 2 [10 U. S. C. 1473 (1946 ed.)] *Persons subject to military law.* The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law," or "persons subject to military law," whenever used in these articles:
>
> * * * * *
>
> (e) All persons under sentence adjudged by courts martial;
>
> * * * * *

ART. 92. [10 U. S. C. 1564 (1946 ed. Supp. IV.] *Murder; Rape.* Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct: *Provided,* That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

STATEMENT

On May 27, 1946, while the petitioner, John Lee, was serving in the United States Army overseas he was convicted by a general court-martial of robbery and assault and sentenced to a dishonorable discharge and twenty years in confinement (R. 11). The discharge was executed (R. 12, 33). Thereafter, while interned in the Army's disciplinary barracks at Camp Cooke, California, he committed the offense of murdering another prisoner on June 10, 1949, and was tried by general court-martial under Article 92 for murder (R. 3, 12, 30), convicted, and sentenced to death (R. 3-4). The sentence was reviewed by the Staff Judge Advocate and approved by the convening authority on November 17, 1949 (R. 15). The record of the trial was reviewed by the Board of Review on March 29, 1950, and by the Judicial Council on July 20, 1950, and found legally sufficient to support the

findings and the sentence (R. 16). On October 4, 1950, the Judge Advocate General of the Department of the Army concurred in the opinions of the subordinate bodies and forwarded the record to the President of the United States who, on October 9, 1950, commuted the sentence to confinement at hard labor for life and ordered it to be carried into execution (R. 16).

On October 18, 1954, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, alleging that the murder sentence was invalid because imposed by court-martial after he had already been discharged. The District Court dismissed the petition as premature (on the ground that petitioner was still serving his robbery sentence) and the Court of Appeals for the Ninth Circuit affirmed, 225 F. 2d 674 (C. A. 9), certiorari denied, 350 U. S. 967. On September 20, 1956, the Army Clemency Board remitted the unexpired portion of petitioner's first (robbery) sentence (R. 10), and as a result petitioner thereafter was in custody only under the life sentence for murder. On October 15, 1956, petitioner filed a new petition for a writ of habeas corpus in the United States District Court for the Northern District of California, again attacking the jurisdiction of the court-martial which convicted him (R. 1, 3–9). After a hearing, the District Court dismissed the petition (R. 28–31). On appeal, the Court of Appeals for the Ninth Circuit affirmed (R. 33–40).

SUMMARY OF ARGUMENT

I

Article 2 (e), which provides for courts-martial jurisdiction over persons held in confinement under sentence adjudged by a court-martial, is not unconstitutional as applied to a dishonorably discharged soldier confined at a military disciplinary barracks.

A. In 1921, this Court sustained Article 2 (e) against the same attack as that levied by petitioner. *Kahn* v. *Anderson*, 255 U. S. 1, unanimously upheld the statute in a factual setting the same as that here involved. And the vitality and validity of the *Kahn* ruling have not been undermined by the subsequent decisions in *Toth* v. *Quarles*, 350 U. S. 11, and *Reid* v. *Covert*, 354 U. S. 1. *Toth* expressly recognized *Kahn* (350 U. S. at 14), and *Covert* dealt with the significantly different problem of overseas court-martial jurisdiction over civilian dependents for capital crimes. Neither the holdings nor the theory of those recent cases govern the present problem. *Kahn* stands undisturbed.

B. If the Court should reexamine the validity of the statute, the decision in *Kahn* should be reaffirmed. The substance of Article 2 (e) has been on the statute books since 1873. Congress has five times reenacted the provision—in 1898, 1916, 1920, 1948, and 1950. Its constitutionality has been sustained throughout its history, by this Court and the lower federal courts.

Moreover, the reasons supporting the legislation are as valid today as they were when *Kahn* was decided. The military prisoner is so intimately connected with

the military establishment that it is appropriate for Congress to continue to subject him to court-martial jurisdiction. For one thing, he continues in a full military environment, and there is clearly no break between him and the military for disciplinary purposes. It would be incongruous and disruptive to make a distinction, for disciplinary purposes, between the military prisoner whose dishonorable discharge has been executed, and the one who merely receives a term of confinement or whose discharge has been suspended during confinement. Another significant factor is that military prisons are operated on military lines for the very purpose of rehabilitating the prisoners—both those without discharges and those already discharged—as full-fledged soldiers, if at all possible. The sum of it is that a military prisoner, even though discharged, can still be fairly viewed as in and a part of the military establishment for court-martial purposes.

The dishonorable discharge can also be viewed as not even technically severing the serviceman from his service until the completion of his prison term. This is an appropriate view of the total Congressional scheme. On the one hand, Congress has specifically subjected dishonorably discharged prisoners in confinement to the Articles of War, and on the other it permits the imposition of a dishonorable discharge as a mode of punishment. The two provisions can properly be construed to postpone the full effect of the discharge until completion of the term of confinement. On that view, petitioner was formally still in

the service when he committed the offense at Camp Cooke.

II

Petitioner was lawfully tried and convicted of the offense of murder under Article 92 which restricts the jurisdiction of courts-martial for this offense to "time of peace." Our position is that when petitioner committed the offense on June 10, 1949, "time of peace" did not yet exist, as that phrase is used in Article 92.

It is important to keep in mind that the question here involved is but one of interpretation of statutory language, not of constitutionality. The power of Congress to provide for this type of court-martial jurisdiction, whether in time of peace or in time of war, cannot be doubted. In *Kahn* v. *Anderson, supra,* this Court also authoritatively construed Article 92. It was there decided that the limitation of the Article becomes operative only after peace is officially declared by the political branches of the Government. At what point officially declared peace occurred after World War II must be determined by examining the actions of the political branches of the Government. Both the Executive branch and the Congress have made it clear that in their view wartime legislation continued to be effective until the formal state of peace arrived on April 28, 1952, with the coming into effect of the peace treaty with Japan. Prior to that time, a limited number of wartime statutes (including other Articles of War) were expressly and selectively terminated or repealed; but not Article 92. It is abundantly clear, from the approach used by Congress with respect to World War II, that all wartime legislation not specifi-

cally terminated was intended to remain effective until the conclusion of the final peace treaty or formal declaration of peace. Article 92 should not be deemed excluded from that pattern.

ARGUMENT

I. ARTICLE 2 (c) OF THE ARTICLES OF WAR IS CONSTITUTIONAL

Petitioner contends that Article 2 (c) of the Articles of War (*supra*, p. 2)—giving courts-martial jurisdiction over military prisoners even after they have been dishonorably discharged from the service [1]—is unconstitutional in that it deprives him of the civilian guarantees of the Fifth and Sixth Amendments. Article I, section 8, clause 14 of the Constitution provides that Congress shall have the power "To make Rules for the Government and Regulation of the land and naval Forces," and the Fifth Amendment provides for indictment by the grand jury "except in cases arising in the land or naval forces." [2] Therefore, the basic question is whether a person who is serving, in a military prison, a term of confinement (lawfully imposed by a court-martial) under an executed sentence of dishonorable discharge is to be considered a member of the land and naval forces during

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[1] Article 2 (7) of the Uniform Code of Military Justice provides for court-martial jurisdiction of "persons in custody of the armed forces serving a sentence imposed by a court-martial." The present case arose before the enactment of the Uniform Code.

[2] One not in the land or naval forces would of course also be entitled to the Sixth Amendment guarantee of a jury trial.

his term of imprisonment so as to render him amenable to court-martial jurisdiction for offenses committed during his confinement.

This question cannot be answered simply by reciting that one who has been given a dishonorable discharge is necessarily a civilian. Such an answer—which is that assumed in petitioner's brief—is merely a restatement of a result. But this is not the result which emerges from the precedents and the realities.

A. THIS COURT HAS ALREADY HELD ARTICLE 2 (c) CONSTITUTIONAL

1. Some thirty-eight years ago, two years after the armistice which closed actual hostilities in World War I, this Court considered the precise question of the validity of Article 2 (c), and squarely and unanimously upheld it. In *Kahn* v. *Anderson*, 255 U. S. 1, the constitutionality of Article 2 (c) was before the Court in circumstances strikingly similar to those presented here. The petitioners had committed offenses while they were in confinement in a military prison as punishment for previous crimes against military law. They were tried by a court-martial and convicted. Petitions for writs of habeas corpus were denied, and this Court affirmed. There was some question as to whether the prisoners had sufficiently alleged a prior discharge from the service imposed by virtue of the sentences upon the original offenses, but the Court held that this was immaterial.[3] Since it was con-

[3] The Government's brief in the *Kahn* case conceded that the prisoners had alleged that they were "not members of or serving as soldiers in the Army" and "were discharged from the Army" prior to committing the offense. Brief for appellee in No. 421, October Term 1920, p. 7.

ceded that at the time of the second trial the petitioners were military prisoners, it made no difference in the opinion of the Court whether or not they had been discharged, for as prisoners "they were for that reason subject to military law and trial by court-martial for offenses committed during such imprisonment" (255 U. S. at 7–8). This holding directly resolved the question presented here. And a holding it was, notwithstanding petitioner's view that the statement was dictum. Only because it made no difference whether or not the prisoners had been discharged was the Court able to dispose of the case as it did. If prisoners once discharged ceased to be subject to military jurisdiction, then the Court would have had to determine the true facts before it could render its decision. It was necessary either to determine the sufficiency of the allegations as to prior discharge, or to give the prisoners the benefit of any doubt and assume such allegations to be adequate, and then decide the case on that basis. It is apparent that the Court chose the latter alternative, and accordingly the decision has been viewed as a square holding ever since 1921.[4]

2. Petitioner asserts that in any event *Kahn* was overruled when this Court decided *Toth* v. *Quarles*, 350 U. S. 11, and *Reid* v. *Covert*, 354 U. S. 1. This position appears to be mainly based on the fact that the opinions in the latter two cases provide a rather

[4] This Court, in the recent *Toth* case, certainly did not consider the quoted language from *Kahn* to be dictum when it referred to it as a holding (350 U. S. at 14).

thorough historical analysis of military-civilian relationships while the *Kahn* opinion disposed of the issue more briefly. That the more succinct handling of the matter in *Kahn* does not diminish its value as a precedent is obvious.[5] And neither in *Toth* nor in *Covert* did the Court cast doubt on the continuing vitality of the *Kahn* ruling. In fact, the one reference to *Kahn* plainly supports the position of respondent. In *Toth*,[6] the Court stated with evident acceptance (350 U. S. at 14):

> This Court has held that the Article I clause just quoted authorizes Congress to subject persons actually in the armed service to trial by court-martial for military and naval offenses. Later it was held that court-martial jurisdiction could be exerted over a dishonorably discharged soldier then a military prisoner serving a sentence imposed by a prior court-martial [citing *Kahn* v. *Anderson* in a footnote; one other footnote omitted].

This comment was made to distinguish what seemed to the Court legitimate cases of exercise of military jurisdiction from the unwarranted extension of court-martial power over one *"who had severed all relation-*

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[5] Since petitioner labors this point, it may not be amiss to point out that one of the arguments used to attack the constitutionality of Article 2 (c) in *Kahn* was that the history of the civilian jury trial safeguards demonstrated that Article 2 (c) was in conflict with the Constitution. See Brief for Appellants, No. 421, October Term 1920, pp. 23–31. The Court was certainly not oblivious to this history.

[6] The opinions in *Covert*, 354 U. S. 1, mention neither *Kahn* v. *Anderson* nor the problem with which it deals.

ship with the military and its institutions" [350 U. S. at 14; emphasis added].

Nor does the general theory of either *Toth* or *Covert* govern the present problem. Petitioner asserts that in those cases the Court held that there are only two classes of persons: (1) those who have been mustered or enlisted into the land or naval forces, and have not been discharged, and (2) all others, who are civilians and therefore not subject to court-martial. But neither *Toth* nor *Covert* so holds or intimates. Of *Toth*, we have already spoken; unlike that petitioner, this petitioner has plainly not "severed all relationship with the military and its institutions." In *Covert*, the opinion of Mr. Justice Black, concurred in by three other Justices, explicitly recognized that the boundary between "civilians" and "members of the 'land and naval forces'" was not a clear one, and indicated that the latter category might include a person who had not been formally inducted into the military or did not wear a uniform (354 U. S. at 22–23).[1] Mr. Justice Frankfurter, concurring, spoke in terms of physical and social proximity as determining whether a person is encompassed in the land or naval forces category for court-martial purposes (354 U. S. at 46). Mr. Justice Harlan, likewise concurring, was emphatic in his view that under

[1] See also *Duncan* v. *Kahanamoku*, 327 U. S. 304, 313–314, where the Court stated: "Our question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war." (Footnotes omitted.)

Article I military jurisdiction extends beyond those in actual service as soldiers in the armed forces (354 U. S. at 70–71).

And beyond these statements, the actual holding in *Covert* leaves open the possibility that even civilian dependents who commit non-capital offenses overseas may be held to be members of the land or naval forces for court-martial purposes. The narrow ruling was no more than that wives, children and other dependents of servicemen who commit capital offenses outside the United States are not comprised within the group excepted from the benefits of the Fifth and Sixth Amendments.

In any case, it is clear that neither the Court as a whole nor any of its members has gone as far as petitioner claims. The Court did not decide or suggest in either *Toth* or *Covert* that all those who had historically been subject to court-martial jurisdiction except those still remaining in actual military units were now exempt from military trials.

B. IF THE COURT RECONSIDERS THIS PROBLEM, IT SHOULD AGAIN SUSTAIN ARTICLE 2 (c)

If the Court should wish to reconsider the problem *de novo*, we submit that Article 2 (c) still withstands attack. The principles of the *Kahn* decision not only rest upon a solid historical foundation but they retain as much vitality today as they had in 1921.

1. Prior to the Civil War, Congress had no occasion to deal with the problem of the status of soldiers serving a military sentence; apparently the disciplinary problem had not yet become acute. However, in the

early 1870's, the need for the establishment of a unified system of military prisons became apparent. Not only was the corrective aspect of a prison system recognized, but also facilities for handling and segregating prisoners were needed to prevent needless details from the ranks to furnish personnel to man the guardhouses in the regiments and on the posts. Additionally, the usual remedy of discharge as a means to eliminate undesirables had proved ineffective, for often they would re-enlist under another name. H. Ex. Doc. No. 61, 41st Cong., 2d Sess., pp. 1–3. What was needed were facilities where military prisoners could be under complete military control and under the supervision of a trained prison staff until the service of their sentence was completed.

After an extended study of the military prisons in Canada, a report was submitted to Congress concerning this matter. H. Ex. Doc. No. 73, 42d Cong., 2d Sess. Congress recognized the need and considered appropriate legislation. See H. Rep. No. 70, 42d Cong., 2d Sess. The statute ultimately enacted established one military prison,[4] and it subjected all persons confined in that prison, under court-martial sentence, to continued court-martial jurisdiction. Act of March 3, 1873, 17 Stat. 582. Specifically, Section 12 of the Act of 1873 provided:

> That all prisoners under confinement in said military prisons undergoing sentence of courts-martial, shall be liable to trial and punishment

[4] Initially to be in Rock Island, Illinois, but subsequently placed at Fort Leavenworth, Kansas. See 18 Stat. 48, Ch. 186.

by courts-martial under the rules and articles of war for offences committed during the said confinement.[9]

Thus, very significantly, from the very inception of the organized military prison system Congress felt it advisable and necessary to provide for continuing military jurisdiction over those who were serving sentences in those prisons. This cardinal fact sheds much light upon our problem, for the constitutional question basically depends, at least in part, upon a resolution of the pragmatic and historical issue of whether or not persons like this petitioner can fairly be said to be encompassed within the concept of land or naval forces. While the ultimate resolution of that question is of course for the Judiciary, it is not insignificant that the Congress has assumed, at least since shortly after the Civil War, that court-martialed prisoners do not become so detached from the land or naval forces as to escape their jurisdiction. Article 2 (e) and its forbears have been continuously on the books since 1873.[10]

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[9] A classification system was set up pursuant to the statute, the character of the offense and the sentence of the prisoner being among the criteria used. One class encompassed prisoners who had been sentenced to be dishonorably discharged from the service and to subsequent imprisonment for long periods for aggravated offenses. H. Ex. Doc. No. 19, 43d Cong., 1st Sess., p. 17.

[10] After the 1873 Act came the 1898 Act (see footnote 14, *infra*, p. 21), and then the adoption of Article 2 (e) in 1916, and again in 1920, and again in 1948. The Uniform Code of Military Justice continued the policy (see footnote 1, *supra*, p. 8). Thus, six different Congresses have affirmatively adopted the provision.

2. (a). The Act of 1873 was upheld from the very beginning. *Ex parte Wildman*, 29 Fed. Cas. (No. 17,653a, D. Kan.), the first case in which the constitutional issue was raised, was identical with the instant case in its operative facts. There, as here, a soldier was tried by court-martial and sentenced to imprisonment and to a dishonorable discharge. While serving his term of imprisonment, after the discharge had been executed, he committed other offenses and was again tried and convicted by court-martial. His petition for a writ of habeas corpus was denied, and the court upheld the constitutionality of the statute on the ground that (1) it was based on the valid proposition that, in order to secure discipline and good order and to protect the public service, military tribunals should be allowed to exercise jurisdiction over persons who have the kind of a relationship to the service which exists between a military prisoner, albeit technically discharged, and the branch in which he serves, and (2) Congress in effect provided that a dishonorable discharge, when coupled with a term of imprisonment, was not to become effective in the sense of breaking the bonds between the service and the prisoner until the sentence was completely served.

Subsequent decisions are to the same effect. In *In re Craig*, 70 Fed. 969 (C. C., D. Kan.), where the constitutionality of Section 12 of the Act of March 3, 1873, was again at issue, the court held:

> The prison in question was designed as a place of punishment for those persons only who, while in the military service of the government, either as enlisted men or otherwise, are guilty

of offenses "against the rules, regulations and laws for the government of the army of the United States." It is a part of our military establishment, as much as the guardhouse, with which our forts and military encampments are always provided. * * * There can be no doubt of the fact that the prison was thus placed in charge of army officers because it was regarded as a military institution, the same as a fort or an arsenal or a navy yard, and for the purpose of subjecting persons who might be confined therein to military law and to the same discipline that is enforced in the army.

Much stress, however, is laid on the fact that when the offense for which Craig was tried and convicted was committed, he had been discharged from the army, and was no longer subject to military law or discipline. This contention overlooks the fact that the discharge was issued in part execution of a sentence which directed that he should not only be dishonorably discharged, with the forfeiture of all pay and allowances, but that he should also be held and confined at hard labor for a given period in a miltary prison. A discharge executed under these circumstances and for such a purpose cannot be said to have had the effect of severing his connection with the army, and of freeing him forthwith from all the restraints of military law. The discharge was no doubt operative to deprive him of pay and allowances, but so long as he was held in custody under sentence of a court-martial, for the purpose of enforcing discipline and punishing him for desertion, he remained subject to military law, which prevailed in the prison where he was

> confined, and subject also to the jurisdiction of a court-martial for all violations of such law committed while he was so held."

In *Carter* v. *McClaughry*, 183 U. S. 365, this Court for the first time had the opportunity to speak on the subject of the status of one dismissed from the service. An Army captain was convicted by court-martial and sentenced to be dismissed from the service, to a fine, and to imprisonment. One of the assignments of error was that the fine and the term of imprisonment were beyond the power of the court-martial to inflict because they were imposed after Carter had ceased to be an officer of the Army of the United States, and after he had ceased to be subject to the jurisdiction of the court-martial. Thus, the petition squarely raised the issue of continuing military jurisdiction subsequent to a discharge or dismissal from the service when imposed in conjunction with a term of imprisonment. The Court held that Carter's view of his status was not well taken (183 U. S. at 383):

> The accused was proceeded against as an officer of the Army, and jurisdiction attached in respect of him as such, which included not

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[11] Petitioner dismisses *Craig* as of little value because allegedly the court there ruled as it did because of an assumed lack of power to declare Congressional enactments invalid (Pet. Br. 9). Not only the excerpts from the opinion quoted above, but also the following specific language by the court, bely that assertion (70 Fed. at 970-971): "It cannot be said that, by authorizing a trial by courts-martial of persons confined in the military prison established at Fort Leavenworth, for offenses committed while so confined, congress has clearly, *or even probably*, exceeded its powers." (Emphasis added.)

> only the power to hear and determine the case, but the power to execute and enforce the sentence of the law. Having been sentenced, his status was that of a military prisoner held by the authority of the United States as an offender against its laws.
>
> He was a military prisoner though he had ceased to be a soldier; and for offenses committed during his confinement he was liable to trial and punishment by court martial under the rules and articles of war. Rev. Stat. § 1361.

Petitioner draws comfort (Pet. Br. 12–14) from the difference that Carter's sentence of imprisonment was pronounced together with that directing his dismissal, while here we are concerned with a second crime, committed after service of the sentence had begun. The fact is, however, that at least one of the principles upon which the doctrine of continued military jurisdiction over military prisoners rests is that of a continuing relationship between the military and the serviceman, in line with the general legal principle that once jurisdiction has attached it continues until all of its aspects have been exhausted (*i. e.*, in this type of case, until the military no longer have control). See *Coleman* v. *Tennessee*, 97 U. S. 509; and see the opinions in *Wildman* and *Craig*, *supra*, pp. 16–18. That principle was sustained in the *Carter* case. Moreover, petitioner's view does not take into account the very specific language in *Carter* to the effect that military courts have jurisdiction of all offenses committed during confinement, *supra*. That

language was of course consistent with, and reconfirmed by, the holding in *Kahn*.[12]

Countering these decisions which explicitly upheld the constitutionality of the predecessor of Article 2 (e), petitioner cites Winthrop as viewing the statute as unconstitutional (Pet. Br. 10–11). Undoubtedly

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[12] Petitioner mistakenly relies upon *United States* v. *Speller*, 24 C. M. R. 178, a decision of the United States Court of Military Appeals. Speller, an aviation cadet, was convicted on two specifications of housebreaking and sentenced to forfeiture of $74 per month for six months. Before any action could be taken by the reviewing authority, he was administratively released from active duty and transferred to the reserves. A question subsequently arose as to whether jurisdiction remained to complete the appellate processes and to execute Speller's sentence, in light of the fact that he had been administratively released from active duty prior to the start of that process. The court not only answered the question in the affirmative, but it went on to say that, under *Toth* v. *Quarles*, 350 U. S. 11, only after the service relationship terminates must the offender be tried in a civilian court. It contrasted the *Toth* situation with that existing in *Carter* and *Speller*, thus sharply illuminating the distinction between *Carter*, *Kahn*, and the instant type of case, on the one hand, and *Toth*, on the other. That distinction lies in the fact that in the first group a service-relationship or connection existed at the time the offense was committed and remained unbroken to the time of the court-martial. In *Toth*, on the other hand, a civilian "gap" existed which prevented reattachment of jurisdiction once the military had lost it. Interestingly enough, in *Speller*—upon which petitioner so heavily relies—the court held that military jurisdiction survived in circumstances showing a complete separation from the service, and even the dissenting judge understood that jurisdiction is not lost where the change of status results from a court-martial prosecution (24 C. M. R. at 180) and that the claim of continuing jurisdiction would be supported where the discharge was the result of a court-martial sentence (24 C. M. R. at 180, 181).

this was Winthrop's belief." Winthrop, *Military Law and Precedents* 105 (Reprint 1920 ed.). But his analysis partakes of the same vice as petitioner's brief—it assumes the very point in issue. Winthrop assumed that a dishonorably discharged soldier serving a term of confinement in a military prison was fully a civilian, and could not be fairly said to be still a part of the military service. In view of all the factors militating against that conclusion (see *infra*, pp. 24 *ff*), it is not surprising that this Court, the lower federal courts, the Court of Military Appeals, the Congress,[14] and the Judge Advocate General's Office, have been unable to concur in it.[15]

Thus, when this Court decided *Kahn* v. *Anderson* early in 1921, it had before it an unbroken chain of

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[13] But Winthrop does not rule out the possibility that the statute might be valid in time of war.

[14] After the abandonment of Leavenworth as the sole central military prison, Section 1361 of the Revised Statutes (Act of March 3, 1873, *supra*) became obsolete because it applied only to that military prison. By that time, soldiers under court-martial sentence were being held in various other places of confinement, principally at post stockades. New legislation became necessary to subject them, too, to the Articles of War. Section 5 of the Act of June 18, 1898, Chapter 469, 30 Stat. 483, 484, filled this gap. It provided that: "Soldiers sentenced by court-martial to dishonorable discharge and confinement shall, until discharged from such confinement, remain subject to the Articles of War and other laws relating to the administration of military justice." Petitioner claims this statute passed Congress in spite of "repeated holdings by the Judge Advocate General and the Secretary of War" (Pet. Br. 16). This is not accurate; the Secretary of War requested the statute, H. Doc. No. 119, 55th Cong., 2d Sess.

[15] The Attorney General, too, saw no constitutional defect in the statute. 16 Op. Atty. Gen. 292 (1879).

legislative and judicial precedent indicating that the relationship between a prisoner of petitioner's class and the military forces is such that the prisoner may fairly be said to be still in the military service, and that accordingly Congress has the power to subject him to military jurisdiction.

(*b*). Since *Kahn*, the courts have occasionally reviewed the law, and again no dissenting voice has been raised to the correctness of the decision. In *Mosher* v. *Hudspeth*, 123 F. 2d 401 (C. A. 10), certiorari denied, 316 U. S. 670, the defendant committed an offense while confined pursuant to a court-martial sentence which included a dishonorable discharge. The court sustained the second court-martial conviction. Petitioner attempts to distinguish that case on the theory that, as of the time of the second trial, the discharge had not become final by confirmation of the reviewing authority. However, when Mosher again sought a writ of habeas corpus, claiming that his severance from the military took place prior to time of trial for the second offense, *Mosher* v. *Hunter*, 143 F. 2d 745 (C. A. 10), the court not only recognized that the earlier case disposed of all the issues presented and that the earlier decision was amply supported by the authorities,[10] but went on to state:

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[10] Petitioner is incorrect in his statement that the second *Mosher* case gave a different date from the first *Mosher* case as to the time of approval of the sentence of dishonorable discharge. (Pet. Br. 21). Both cases give May 24, 1920, as the date of approval by the Commanding General, and both cases state that approval of the dishonorable discharge by the Office of the Judge Advocate General was on July 23, 1920.

> * * * however since we are again urged to specifically decide on what date the appellant became officially separated from the military service by force of the first judgment and sentence of the court-martial we deem it appropriate to particularize the immateriality of that particular question in the light of our decision in the former case [143 F. 2d at 746].

After discussing the authorities, the court concluded:

> It is thus clear that the date of the finality of his dishonorable discharge is immaterial since when on May 23, 1920, appellant escaped from the custody of the military authorities he had been tried, convicted, and was "under sentence adjudged by courts-martial," hence within courts-martial jurisdiction for offenses committed during this time [143 F. 2d at 746].

In *McDonald* v. *Lee*, 217 F. 2d 619 (C. A. 5), certiorari granted and remanded with directions to dismiss as moot, 349 U. S. 948, the Court of Appeals for the Fifth Circuit, too, specifically sustained the constitutionality of the statute subjecting dishonorably discharged military prisoners to trial by courts-martial. See also *Toth* v. *Quarles*, 350 U. S. 11, 14. In sum, over eighty years of direct precedent would have to be overturned before petitioner could succeed on this issue.

3. Even putting history and precedent to one side, Article 2 (e) should be upheld. Congress could validly conclude that the relationship between petitioner and the military is sufficiently close that he can be treated as still within the land or naval forces for court-martial

purposes. Unlike Mrs. Covert, he clearly was a full-fledged member of the armed forces, in the narrowest sense, prior to his court-martial, and he is still fully subject to military direction. Unlike Mr. Toth, who had returned to his home and was engaged in civilian pursuits at the time of his arrest, his connection with the military has, by his own admission, not been wholly severed. He concedes that "the military retained certain authority over him, including certain disciplinary authority, so long as he was confined in a military prison" (Pet. Br. 27).[17]

(*a*). The suggestion that a punitive discharge, together with a sentence to military confinement in a military prison or disciplinary barracks (as it has been called since 1915), severs all connection of the discharged person with the military, is not correct. One of the objectives of military punishment is to rehabilitate offenders to the point where they may be restored to active duty with a view to eventual honorable discharge. For example, 10 U. S. C. 1456 (1946 ed.), Act of March 4, 1915, Chapter 143, Section 2, 38 Stat. 1085—which was in effect at the time of petitioner's term of imprisonment[18]—authorized the Secretary of War to place in military training those offenders whose record showed that restoration to duty might

[17] Our position at this point is that Article 2 (c) is constitutional even if it be assumed that petitioner's dishonorable discharge became completely effective prior to the time the offense in question was committed, but see pp. 29–33 *infra*, for he was in custody of, and closely connected, albeit involuntarily, with the military establishment.

[18] A similar provision is found in 10 U. S. C. 3662–3663 (Supp. V).

be warranted. Such prisoners were organized into disciplinary companies and higher units, organized as infantry with noncommissioned officers. Military training was to be carried on within the confines of the disciplinary barracks. The Secretary of War was further authorized to remit unexecuted portions of sentences and restore to duty those prisoners who had not previously been discharged. Prisoners already discharged as part of their sentences could, upon written application, be re-enlisted and restored to duty. The re-enlistment was effective to revive the prisoners' enlistment contract for the period equal to that which was not served under the contract which was suspended by the dishonorable discharge. 10 U. S. C. 1457 (1946 ed.). This policy of restoring offenders to active duty is designed to promote the military security of the United States by the maintenance and furtherance of an efficient fighting machine within the land and naval forces. In such a program, continued military discipline obviously plays a highly important part.

Moreover, a dishonorably discharged prisoner is not only in the custody of the military, but he is supervised, clothed, fed, and instructed by military personnel. His life and surroundings are still military, his environment wholly military. Petitioner cites Judge Advocate General opinions and policy statements as indicating that the Army itself views dishonorable discharged soldiers as not soldiers for various purposes (Pet. Br. 24). The obvious answer is that, whatever label the Army chose to describe dishonorably discharged soldiers for the specific purposes it

then had under consideration, the military has never intimated that a dishonorably discharged soldier serving military confinement is not subject to court-martial jurisdiction, or is wholly a civilian. In the opinions cited by petitioner (6 Bull. J. A. G. March–April, 1947, § 423 (1), p. 66 and 5 Bull. J. A. G. April 1946, § 419 (2)), p. 93, where the question was whether or not the dishonorably discharged soldier in confinement could commit the military offenses proscribed by Articles of War 61 (absence without leave) and 65 (disobeying the orders of a non-commissioned officer), there was no indication that these prisoners were civilians not subject at all to court-martial jurisdiction. It is clear that all of the non-military offenses proscribed by the Articles of War, and at least some of the military offenses, can be committed by dishonorably discharged soldiers in confinement.[19] Furthermore, the statements contained in 1 Bull. J. A. G. 100 (Pet. Br. 24) that dishonorably discharged soldiers in confinement are not entitled to special service (*i. e.*, recreational) equipment, and are not, when killed by the enemy, entitled to be regarded as being in military service at the time of death, are consistent with the purpose of a dishonorable discharge. Such a discharge is punitive; its object in part is punishment. Its effect is to deprive the person of certain benefits; yet if he is in military confinement, the discharge may continue to require him to conduct himself within the framework of the

[19] The offense in *McDonald* v. *Lee*, 217 F. 2d 619 (C. A. 5), *supra*, p. 23, was disrespect toward a superior officer, in violation of Article 89, U. C. M. J., a military offense.

Articles of War or hazard the pains and penalties of a court-martial trial.

If petitioner's contention were sustained, the anomalous situation would result that dishonorably discharged prisoners held in military custody would be immune from normal military sanctions (including additional terms of confinement), while prisoners who had committed less serious offenses (and were not given the additional punishment of a dishonorable discharge, or whose dishonorable discharges were suspended during confinement) would be subject to the Articles of War while serving their sentences. Prisoners receiving a dishonorable discharge could flout authority (short of committing a crime cognizable by the civilian courts), and expect only ordinary prison discipline, while prisoners not so discharged would be subject to full military jurisdiction while in confinement. This would plainly create a difficult and unsettling problem in the administration of military penal and correctional institutions.[20]

(*b*). Those charged with the burden of administering discipline in the military establishment have long felt that continued military jurisdiction over discharged military prisoners is necessary, essentially for the

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[20] Petitioner quotes (Pet. Br. p. 17) from H. Rep. No. 2132, 54th Cong., 1st Sess., p. 2, in support of his contention that Congress intended to give the military jurisdiction only for infractions of prison rules. But that report cannot be so read. Taking the view most favorable to petitioner, the report states that it was the purpose of the bill to maintain military jurisdiction over soldiers sentenced to dishonorable discharge and confinement, and that the "probability" was that the offenses so committed would be breaches of military discipline.

reasons detailed above. The Secretary of War, writing to Congress in support of the bill which became the Act of 1898 (see footnote 14, *supra*, p. 21), had this to say:

> The military prison has now been discontinued, and military prisoners who have been discharged from the service by virtue of their sentences, * * * are now serving their terms at military posts. There is, however, no law which subjects them to the discipline of trial by court-martial under the Articles of War, and an important means of making confinement an effective military punishment is, therefore, lacking. To announce to the prisoner that, no matter what he may do, he cannot have the term of his confinement extended is a direct encouragement to insubordination and must impair the effect of military imprisonment as an exemplary punishment. In order to remedy this evil, it is very desirable that there should be legislation declaring that soldiers sentenced by court-martial to dishonorable discharge and confinement shall, until discharged from such confinement, remain subject to the Articles of War and other laws relating to the administration of military justice. [H. Doc. No. 119, 55th Cong., 2d Sess., p. 3, 1897.]

The Committee on Military Affairs, considering the proposed legislation, agreed with the Secretary of War's recommendation (H. Rep. No. 224, 55th Cong., 2d Sess., 2):

> It seems reasonable that, as the prisoner is in the custody of the military authorities while serving out a sentence, he should also be subject to the laws regulating military discipline. * * *

See also H. Rep. No. 2132, 54th Cong., 1st Sess. There has been no change in this position through the years since 1898.

4. Moreover, the total congressional court-martial scheme shows that a dishonorable discharge such as that given to petitioner is not a full severance from his military service, but that the discharged prisoner is viewed by Congress as still continuing in the service even in the technical sense.

Article 2 (e) specifically directs that all persons under sentence adjudged by court-martial shall be amenable to continued military jurisdiction.[a] On the other hand, the Articles of War permit the imposition of punitive discharges in conjunction with a sentence of confinement.[b] A natural reading of these two provisions is that Article 2 (e) suspends the full effect of a dishonorable discharge which is coupled with a term of imprisonment until that

[a] Petitioner suggests that the effect of this article is that a military prisoner serving his sentence in a civilian prison would be subject to the Articles of War. Whether or not this statute was meant to be that broad, and if it was whether or not it could withstand a constitutional test in that situation, is not before this Court. Petitioner was in a military disciplinary barracks when he committed the offense now in question. The Uniform Code of Military Justice, Article 2 (7), expressly limits jurisdiction to persons "in custody of the armed forces."

[b] The Articles of War under which petitioner was tried do not expressly provide for dishonorable discharge by general courts-martial (although there are references to such a discharge). See 10 U. S. C. 1484 (1946 ed. Supp. IV). Earlier Articles did so provide. Under Article 45, 10 U. S. C. 1516 (1946 ed.) (Article 56, U. C. M. J.) the President prescribes by Executive Order the maximum table of punishments.

term expires."[28] For, by providing in Article 2 (c) for courts-martial jurisdiction over persons confined under a prior court-martial sentence, Congress directed that punitive discharges could not and should not completely sever the serviceman's connection with the military establishment so long as he was serving a term of imprisonment imposed by court-martial. The court-martial process would not have power to separate such a serviceman completely from the service.

That the Congress took this view of the statutory scheme was made clear in connection with the 1898 Act, 30 Stat. 483, 484. That statute provided:

> * * * Soldiers sentenced by court-martial to dishonorable discharge and confinement shall, until discharged from such confinement, remain subject to the Articles of War and other laws relating to the administration of military justice.

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[28] It may be argued that the military could refrain from giving, or executing, a dishonorable discharge until the accused's prison term has expired. But this overlooks the fact that a dishonorable discharge is a form of punishment. The deprivations of benefits which it imposed on the accused are to take effect immediately. Formal suspension of a punitive discharge is provided for by Article 52, 10 U. S. C. 1524 (1946 ed.). Its purpose is not to retain jurisdiction over the discharged soldier, but rather it is a discretionary power to be used in a manner similar to suspended sentence provisions in federal and state courts. If the punitive discharge is suspended, the deprivation of certain benefits incident to such discharge are also suspended during that period. In certain cases it is not deemed appropriate to suspend the discharge during confinement, while in others that discretionary relief is accorded.

The committee report indicated a clear intent to defer the full effect of a punitive discharge imposed under such conditions until after the expiration of the prisoner's sentence. H. Rep. No. 224, 55th Cong., 2d Sess., p. 2, declares:

> It seems reasonable that, as the prisoner is in the custody of the military authorities while serving out a sentence, he should also be subject to the laws regulating military discipline. *Furthermore, he should not be treated as absolutely discharged [from] the service until his term of imprisonment has expired. Dishonorable discharge, being a part of the sentence, ought not to be held to take full effect until the expiration of his term of imprisonment,* although the sentence would operate as a forfeiture of all pay and allowances. Section 4 therefore renders the law coherent. [Emphasis added.]

See also H. Rep. No. 2132, 54th Cong., 1st Sess., which was adopted by the later House Report.

This recital makes clear the meaning and the effect of a dishonorable discharge coupled with a term of confinement.[*] And while the language of the 1898 statute was changed in the 1916 revision, 39 Stat. 650–651,[**] there was no intent to change the statute in this respect. See S. Rep. No. 130, 64th Cong., 1st Sess., App., p. 38.

Accordingly, the rules and regulations which Congress has prescribed for the armed forces limit, by

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[*] *In Ex parte Wildman, supra*, p. 16, the court clearly recognized this legislative scheme, and in part based its decision on this theory.

[**] "All persons under sentence adjudged by courts-martial." This language remained unchanged in the 1920 and 1948 amendments to the articles. 41 Stat. 787, 62 Stat. 604, 628.

necessary implication, the court-martial's power to sever the military connections of a dishonorably discharged person who must undergo confinement. Since Congress clearly directed that military personnel sentenced by court-martial to both dishonorable discharge and confinement shall remain subject to the Articles of War until released, no court-martial sentence can legally provide for a greater severance of the prisoner's relationship with the military and with military jurisdiction, lest it contravene this congressional mandate. The sentence of dishonorable discharge must be construed in the light of the congressional directive contained in Article 2 (e), and petitioner cannot claim to have been fully severed from the service until the end of his military confinement. No constitutional barrier prevents this Congressional suspension of absolute discharge from the military service until the end of military confinement; although he forfeits the rights and privileges of a regular soldier, the prisoner's connection with the military establishment continues to remain so close and direct (see *supra*, pp. 24–29) that his status can properly be viewed as another form of membership in the armed forces.[20]

On this view, petitioner was still *in* the service, even in the technical and literal sense, when he committed the offense at Camp Cooke for which he was court-mar-

[20] Congress plainly has the power to prescribe various types of membership in the armed forces, and the incidents of the different types of membership may be appropriately varied. Cf. *Mitchell* v. *Cohen*, 333 U. S. 411, 418; *United States* v. *Mouat*, 124 U. S. 303; *United States* v. *Hendee*, 124 U. S. 309; *Hurley* v. *Crowley*, 50 F. 2d 1010 (C. A. D. C.).

tialed, and therefore clearly subject to court-martial jurisdiction.

II. PETITIONER'S OFFENSE WAS NOT COMMITTED "IN TIME OF PEACE"

Article 92 of the Articles of War provided (*supra*, p. 3) that the offenses of murder and rape committed within the geographical limits of the United States are not triable by court-martial if the offense was committed "in time of peace." Petitioner was tried for, and convicted of, a murder committed on June 10, 1949, at a military disciplinary barracks in California. It is his contention that on that date "time of peace" existed in the United States, as the phrase is used in Article 92, and that accordingly the court-martial had no jurisdiction to try, convict, and sentence him.

In resolving this issue, all constitutional problems must be put to one side. This is not a case of whether a statute meets the test of constitutionality under the war power. Where that is the issue, the courts may and do make some inquiry as to the facts underlying the Congressional or Presidential determination of the existence of a war or an emergency. Thus in *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543, 547, the Court stated that it did not have the "liberty to shut its eyes to an obvious mistake, when the *validity of the law* depends upon the truth of what is declared." (Emphasis added.) See, also, *Youngstown Sheet & Tube* v. *Sawyer*, 343 U. S. 579. Yet even in that type of case the courts look primarily to the political branches of the Government to determine

the existence of war or peace (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146), and the war power has been construed to constitute an effective underpinning to emergency legislation long after actual hostilities have ceased. *Ludecke* v. *Watkins*, 335 U. S. 160; *In re Yamashita*, 327 U. S. 1; *Stewart* v. *Kahn*, 11 Wall. 493, 507.

The constitutional extent of "war powers" is not at all involved in the present case because Congress could validly provide for court-martial trial of murders committed by servicemen in time of peace. Article 1, Section 8, Clause 14, gives Congress the power to make rules for the government and regulation of the land and naval forces, and this power is obviously not dependent upon the existence of a state of war nor is it limited to the trial of military personnel for purely military offenses."[11] The Fifth Amendment excepts from its proscriptions all cases arising in the land and naval forces. It also excepts cases arising in the militia in time of war or public danger. Accordingly, Congressional power extends over the militia only in times of war or emergency while its power is unlimited with respect to the "land and naval forces." See *Johnson* v. *Sayre* 158 U. S. 109. Indeed, in *Coleman* v. *Tennessee*, 97 U. S. 509, this Court described Congressional power with respect to the land and naval forces as "plenary". *Coleman* held that a

[11] In *Toth* v. *Quarles*, 350 U. S. 11, and *Reid* v. *Covert*, 354 U. S. 1, the Court indicated that the jurisdiction of courts-martial could be predicated only on clause 14, not on the war power.

predecessor of Article 92 did not endow courts-martial with exclusive, but only with concurrent, jurisdiction for the offense of murder, but the Court recognized that Congress could have provided for exclusive military jurisdiction had it so desired. See also *Dynes* v. *Hoover*, 20 How. 65, and *Ex parte Milligan*, 4 Wall. 2. The question was wholly a statutory one.

Similarly, the narrow point at issue here is whether the clause in "time of peace" as used in Article 92 should be read to mean the period of time following an official declaration of the end of a war, or a period of time following the cessation of actual hostilities. This is purely a statutory issue, not a constitutional one. All that is required is for the Court to determine what Congress meant in using the term "time of peace." And those who have hitherto had occasion to deal with the problem have viewed the statute as encompassing persons who, like this petitioner, committed the offense prior to the signing of a definite peace treaty.

A. THIS COURT HAS ALREADY HELD THAT "TIME OF PEACE" FOR THE PURPOSE OF ARTICLE 92 DOES NOT EXIST UNTIL COMPLETE PEACE IS OFFICIALLY DECLARED

1. As with respect to the issue discussed under Point I, *supra*, *Kahn* v. *Anderson*, 255 U. S. 1, is decisive. One of the contentions there made was that when the trial occurred, after the World War I armistice, it was time of peace, and therefore no jurisdiction existed under Article 92. The Court unanimously held (255 U. S. at 9):

> That complete peace, in the legal sense, had not come to pass by the effect of the Armistice

and the cessation of hostilities, is not disputable. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146. It is therefore difficult to appreciate the reasoning upon which it is insisted that, although the Government of the United States was officially at war, nevertheless, so far as the regulation and control by it of its army is concerned, it was at peace.

And it went on to state (255 U. S. at 9–10):

> Coming now to consider that question in the light (1) of the rulings in *Ex parte Milligan*, 4 Wall. 2; *Coleman* v. *Tennessee*, 97 U. S. 509; *Ex parte Mason*, 105 U. S. 696, and *Caldwell* v. *Parker*, 252 U. S. 376; (2) of the differences between the Articles of 1874 and those of 1916 showing a purpose to rearrange the jurisdiction of courts-martial; (3) of the omission of the qualification, "except in time of war," from the clauses of the latter articles conferring jurisdiction as to designated offenses, including those capital (Articles 92 and 93), and its retention in the article dealing with the duty of the military to deliver to the state authorities (Article 74), and (4) of the placing in a separate article (Article 92) of the provision conferring jurisdiction as to murder and rape and qualifying that jurisdiction by the words, "in time of peace," not used in the previous articles, we are of opinion that that qualification signifies peace in the complete sense, officially declared. The fact that the Articles of 1916 in other respects make manifest the legislative purpose to give effect to the previous articles as interpreted by the decided cases to which we have referred, at once convincingly suggests that a like reason controlled in adopting the

limitation, "except in time of peace," contained in Article 92. See *McElrath* v. *United States*, 102 U. S. 426, 438, where it was expressly decided that the limitation, "except in time of peace," on the power of the President to summarily dismiss a military officer, contemplated not a mere cessation of hostilities, but peace in the complete sense, officially proclaimed. Indeed, in that case it was pointed out that this significance of the words had received the sanction of Congress and had been made the basis for the adjustment of controversies depending upon the time when peace was established.

In the light of this unequivocal language and the reasoning which supports it, it is completely unrealistic to attribute to *Kahn* the intention to do no more than to hold that, as petitioner suggests (Pet. Br. 34), once jurisdiction attaches it persists until the completion of the sentence. Nor was the definitive interpretation of Article 92 in that case an off-hand expression of opinion based neither on reason or research. The Court, reviewing the history of the Articles of War, reasoned that the legislative purpose of the 1916 Articles was to give effect and meaning to the particular provisions involved, in the light of the decided cases.[28] And it pointed out that it had previously been decided that "time of peace" contemplated more than a cessation of hostilities but was

[28] Congress was concerned with this phase of Article 92 at the time of the first enactment of the Article in 1916 only to the extent that a discussion took place on whether there should be a peacetime limitation on the jurisdiction of courts-martial. The provision finally adopted, of course, contained the limitation. See S. Rep. No. 130, 64th Cong., 1st Sess., App., p. 88.

peace in the complete sense officially proclaimed. Indeed, in *McElrath* v. *United States*, 102 U. S. 426, the Court expressly held that the limitation on presidential power to dismiss summarily an officer "in time of peace" meant peace in its complete sense officially declared. 102 U. S. at 438.

2. When Article 92 was reenacted in 1948, the *Kahn* decision, which was then twenty-seven years old, was incorporated into the revision, under the familiar canon on reenactment of legislation construed by this Court.[9] And since the problem is solely a statutory one, there is no obstacle to full application of the traditional rule.[10]

B. "TIME OF PEACE" FOR ARTICLE 92 STILL MEANS COMPLETE PEACE OFFICIALLY DECLARED, AND THAT EVENT DID NOT OCCUR WITH RESPECT TO WORLD WAR II UNTIL APRIL 1952

The *Kahn* ruling was correct when decided, and subsequent history has confirmed its soundness and applicability to the present case.

1. In general, this Court has recognized that, even for constitutional purposes, cessation of hostilities does not necessarily end a war. For instance, in *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, the Court was faced with the validity of a statute prohibiting the sale of distilled spirits, which derived its vitality from the war power. The Act had been passed after the

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[9] There was no discussion, at the time of the 1948 revision, of the phrase "in time of peace" in Article 92.

[10] Since the meaning which the *Kahn* case gave to the phrase "in time of peace" involved only a construction of the statute, "if it states a rule undesirable in its consequences, Congress can change it." *Screws* v. *United States*, 325 U. S. 91, 112–113.

signing of the armistice ending hostilities in World War I and it was contended that the war power could not sustain the statute. Notwithstanding the fact that an armistice had long been in effect and that hostilities had ceased, the Court, in an opinion by Mr. Justice Brandeis, concluded that the Act, which was less related to the maintenance of military activities during the post-armistice pre-treaty period than the instant statute, was an effective exercise of Congressional war power. In *Ludecke* v. *Watkins*, 335 U. S. 160 the statute gave the President the power to remove alien enemies. Again, the question was whether such power could survive the cessation of hostilities. Although World War II hostilities had clearly ended when the case arose, the Court sustained the Presidential action (335 U. S. at 166–169):

> Nor does law lag behind common sense. War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops. * * * "The state of war" may be terminated by treaty or legislation or Presidential proclamation. *Whatever the mode, its termination is a political act.* * * * Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled. [Emphasis added].

See also *Woods* v. *Miller*, 333 U. S. 138; *Knauff* v. *Shaughnessy*, 338 U. S. 537.

2. The political branches have recognized their responsibility for declaring the end of a war and for terminating wartime enactments. Various methods may be, and have in the past been, employed to signal a war's official termination. The war may be terminated by treaty, or by legislation, or by Presidential proclamation. *Ludecke* v. *Watkins, supra.* When a war is thus terminated, legislation limited to the time of war dies. On the other hand, such legislation may be specifically terminated prior to the official end of the war. And with respect to pre-treaty termination, wartime laws expire in one of two ways: (1) in a wholesale manner, by Presidential proclamation or other executive or legislative act terminating the state of war, or (2) by a selective repeal or termination of statutes no longer meeting the requirements of the situation existing subsequent to the cessation of hostilities but prior to the official end of the war.

(*a*). The first approach was tried in the wake of World War I. Congress was then confronted for the first time on so colossal a scale with the need for shifting a society geared for the prosecution of an all-out war to a peacetime basis. At first, it attempted to meet this task by a blanket termination of wartime legislation (H. J. Res. 327), but this was vetoed by the President. See 59 Cong. Rec. 7747, 7805, 7808. Thereafter, following only a cursory and superficial examination of the laws involved, most of the legislation dependent upon the existence of a state of war was terminated or repealed. 41 Stat. 1359; (H. J. Res. 382); H. Rep. No. 1111, 66th Cong., 3d Sess.,

1920; S. Rep. No. 706, 66th Cong., 3d Sess., 1921. Some specific statutes were mentioned in the debates but no attempt was made to consider each statute. See 60 Cong. Rec. 290.

It is significant that the form of the terminating resolution after World War I was a blanket termination of statutes depending on the war, coupled with a short list of *excepted* statutes which were not to be affected by the resolution. In this form, the World War I resolution raised some question as to its effect on permanent legislation effective only in "time of peace". The Secretary of the Navy requested clarification from the Attorney General as to certain statutes containing the clause in "time of peace". The Attorney General, concluding that the resolution terminated the statutes in question, stated (32 Op. Atty. Gen., 505, 509–510):

> the terms "state of war," "state of peace," "time of war," "time of peace," are mutually exclusive and exhaust the categories. A "state of war" is the absence of a "state of peace," "a time of war" is the absence of a "time of peace" and vice versa. To affirm the one is to deny the other. When, then, the *proper authority* affirms that a legal state of war has begun, exists, or has terminated, it denies, by necessary implication, those qualities as to a state of peace. * * *
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> In my opinion this same reasoning is applicable where, as in the joint resolution of March 3, 1921, the proper authority affirms the termination of a state of war, not for all purposes, but so far as concerns Acts of Congress dealing with

> internal affairs. It is true that the field with which the joint resolution purports to deal is limited, and is, as it were, carved out of the whole field of a state of war existing for all purposes. Nevertheless, in that limited field it is just as impossible to conceive of a state of war terminating without a state of peace beginning, just as impossible to conceive of a period of time which has ceased to be a time of war and yet has not become a time of peace, as it is in the larger field of a state of war for all purposes * * *. [Emphasis added.]

In short, the resolution was viewed as terminating all permanent legislation not excepted, whether or not it related to "time of peace" or "time of war."

(*b*). A totally different approach was employed after World War II. Although resolutions were introduced in 1945 which would have terminated the state of war immediately, no Congressional action was taken at that time. Instead, Congress conducted an investigation of the problems involved in making the transition from war to peace. See Hearings Before Subcommittee No. 4 of House Committee on Judiciary, On Cessation of Hostilities, Termination of the War and Emergencies, 79th Cong., 1st Sess. (1945); *id.*, 79th Cong., 2d Sess. (1946). The conclusion drawn by the committee was markedly different from the initial Congressional sentiment after World War I, in spite of vigorous support for a blanket termination of wartime legislation. After a prolonged and detailed study of the

> four-hundred-odd war, hostilities, and emergency statutes * * * it was concluded that

certain of the statutes, effective during a state of hostilities, war, or emergency, must be continued in effect in order to properly carry out the objectives to be attained by both the military and civilian agencies of the Government, even though the so-called shooting period was concluded. It was likewise concluded that the hostilities, the war, and the emergencies cannot be terminated as to certain statutes and continued as to other statutes. Any blanket termination should apply to all statutes and powers or to none at all. Therefore it is deemed inadvisable at this time to take any action on the termination of hostilities, the war, or the emergencies."[21]

The committee appended to its report a list of wartime statutes which were recommended for immediate repeal or termination. *Id.* at 3–15. Article 92 is significantly absent, although at least one of the compilations of wartime statutes which was available to Congress when it was determining which statutes to render inoperative or repeal contained Article 92. Library of Congress Legislative Ref. Serv. Pub. Aff. Bull. No. 35, p. 89 (1945).

This piecemeal approach to the termination of wartime measures was probably prompted by the magnitude of the problem of shifting the United States to a peacetime economy, as well as a peacetime military establishment. In 1945, the President, in a message to Congress, indicated that the time had not yet arrived for a proclamation of the cessation of hostilities, much less a termination of the war. He stated

[21] H. Rep. No. 2682, 79th Cong., 2d Sess., p. 2 (1946).

that wartime statutes would remain in effect until a final state of peace had been restored unless a specific termination date was established by appropriate Government action with respect to any particular enactment. And he admonished Congress to draft with care any terminating legislation. 91 Cong. Rec. 8377, 8380. Attached to this message was a list of major wartime statutes prepared by the Department of Justice and transmitted to the President by the Attorney General. H. Doc. No. 282, 79th Cong., 1st Sess.

On December 31, 1946, the President proclaimed the *cessation of hostilities*—which had the effect of terminating some of the wartime measures appearing on the Attorney General's list. 61 Stat. 1048, 12 Fed. Reg. 1. Yet even here the President was quite careful to indicate that a state of war still existed.[*] The result of this Proclamation was that only certain specified statutes become inoperative. See S. Doc. No. 42, 80th Cong., 1st Sess., which lists the statutes terminated by this Presidential Proclamation.

The Congressional study concerning the termination of the war, begun in 1945, did not reach fruition until the next session of Congress. The problem was again studied during the 80th Congress and Senate Joint Resolution 123 was passed, listing several hundred war measures which were either repealed or rendered inoperative. Section 3 of the resolution stated that, for the purposes of interpreting the enumerated stat-

[*] "Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated." 61 Stat. 1048.

utes, the war was to be construed as having terminated as of the effective date of the resolution, 61 Stat. 449, 451 (July 25, 1947)." See, also, S. Doc. No. 42, 80th Cong., 1st Sess.; S. Rep. No. 339, 80th Cong., 1st Sess., Part 2; H. Rep. No. 799, 80th Cong., 1st Sess."

The Joint Resolution terminated numerous provisions of the Articles of War (Articles 2 (d), 48, 58, 59, 74–79, 104, 119). 61 Stat. 449, 452. But numerous other provisions of the Articles, which were either operative only in time of war or inoperative in time of peace, were not so affected."

It is clear from this history that Congress proceeded by way of a conscious and deliberate selection and

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"Other statutes were repealed as of other dates (July 1, 1948; six months after the enactment of the joint resolution). 61 Stat. 451.

"Lists submitted during the previous session can be found in H. Doc. No. 282, 79th Cong., 1st Sess., 1945; Library of Congress Leg. Ref. Serv. Pub. Aff. Bull. No. 35, 1945.

"The following Articles of War were not rendered inoperative by the resolution. Articles: 39 (statute of limitations applicable to offenses except for desertion in "time of war"), 42 (places of confinement for non-military offenses—except for desertion in "time of war"), 45 (maximum penalties in time of peace limited), 70 (in time of peace no person brought to trial within five days of service of charges), 85 (officer drunk on duty, mandatory dismissal in time of war, discretion of court-martial in time of peace), 86 (death prescribed for sentinel drunk or sleeping on post in time of war), 92 (murder and rape limitation on court-martial jurisdiction in time of peace), 118 (no officer dismissed except by general court-martial in time of peace). The fate of Articles 80, 81, and 82 is not certain. See itemized list of provisions affected by the resolution, in H. Rep. No. 799, 80th Cong., 1st Sess., Appendix, p. 24.

elimination, which was in keeping with the President's request. 91 Cong. Rec. 8380. Moreover, the fact that the Joint Resolution listed certain Articles of War, and not others, indicates: (1) that Congress deliberately excluded certain provisions from the operation of the Resolution, among them Article 92, and (2) that Congress intended that the provisions not included should continue to be operative. It is also clear that Congress did not conceive that the war had come to an end at that time insofar as the Articles of War were concerned, since otherwise the specific act of terminating some of the war-time legislation, *including certain of the Articles of War*, would have been a useless and futile act."

3. Since the wartime clause of Article 92 was not earlier terminated by specific Congressional action, it remained operative and effective until the formal declaration of peace. With respect to World War II, the formal declaration of peace occurred on April 28, 1952, the effective date of the Japanese Peace Treaty.

The President reflected this fact by his Proclamation of April 28, 1952, 66 Stat. C31, in which he stated:

> the state of war * * * which was the last of the aforesaid states of war still existing, was terminated by the coming into force this day of the Treaty of Peace with Japan * * *.

Later, the President reiterated this view in his Proc-

" The Court has already expressly recognized that neither the Presidential Proclamation of 1946 nor the Joint Resolution of July 1947 terminated the state of war. *Woods* v. *Miller*, 333 U. S. 138, 140; *Knauff* v. *Shaughnessy*, 338 U. S. 537, 546.

lamation (No. 3001) of December 24, 1952, 67 Stat. C. 24, in which he granted amnesty and pardon to persons guilty of the offense of desertion in time of war between August 14, 1945 and June 25, 1950. He stated:

> the last of the states of war existing at that time was not formally and legally terminated until April 28, 1952 * * *.

There can thus be no doubt as to what date was regarded by the Executive Branch of the Government as establishing peace, officially declared.

Congress, too, was clearly aware that officially declared peace for the purposes of the Articles of War did not arrive until the Treaty of Peace—on April 28, 1952. Aside from the history of S. J. Res. 123, discussed *supra*, pp. 44–46, there is other legislative material to this effect. In 1948, Congress substantially amended the Articles of War, including Article 92. The legislative history of the 1948 revision shows that Congress contemplated that a state of war still existed when that revision was adopted. For example, Article 53, which was entirely new, provided that those convicted by court-martial could petition for a new trial within one year after final disposition of the case or one year after termination of World War II, whichever was later. See Hearings Before the Subcommittee of the House Committee on Armed Services on H. R. 2575, To Amend the Articles of War, Etc., 80th Cong., 1st Sess., 2121, 1947. It would have been absurd for Congress to have enacted this provision in 1948 had it regarded the war as having terminated prior to that date.

Even as late as 1949, when the Uniform Code of Military Justice was being considered, specific attention was given to Article 53. While the World War II proviso was eliminated from the permanent legislation, the Article was reenacted in 50 U. S. C. 740 (1952 ed.), which declared that with respect to World War II cases the termination date of the war would be May 31, 1951. Mr. Larkin, one of the special committee members who drafted the Code, testified that some provision should be made for a cut-off date for the World War II cases "because the war is not over yet." He stated further that:

> Cases currently tried are construed to come within the additional time limit you have in that proviso, and I do not know but what there should be a distinction between the 1 year petition for fraud and newly discovered evidence, starting with cases that are tried under this new code whenever it becomes effective and the petition as to all of the cases that are still within the war period, the war not having terminated and the cases being tried today coming under that provision. [Hearings Before Subcommittee No. 1 of the House Committee on Armed Services, Uniform Code of Military Justice, 81st Cong., 1st Sess., 1215 (1949).]

Congress was fully aware, not only when it amended the Articles of War in 1948, but when it enacted the Uniform Code in 1950, that, at least for these purposes, the war had not yet terminated.

Thus, it is apparent that events since 1921—particularly the subsequent legislative history of Article 92 and of the 1948 and 1950 amendments to the court-

martial statutes—offer no reason to depart from the construction given to the phrase "in time of peace" in *Kahn*. Indeed, the history affirmatively indicates that Congress accepted and intended to perpetuate the *Kahn* rule.

4. Petitioner contends, however, that the concept of the *Kahn* case is in conflict with several decisions of the United States Court of Military Appeals (Pet. Br. 31, 35–38). His argument is that these cases demonstrate that, for the purpose of construing the phrase "in time of war" or "in time of peace", the courts will make a *de novo* determination, irrespective of the declarations of the political branches of the Government. First, it should be pointed out that the cases which he cites are of extremely limited application. The armed conflict there involved was the so-called Korean war. United States military participation in this conflict commenced without a formal declaration of war; it was initiated pursuant to treaty obligations concerning and under the auspices of the United Nations. In the absence of a formal declaration of war, no formal declaration of peace was necessary or even possible in that specialized situation.

Even with these qualifications, the rulings of the Court of Military Appeals are not in conflict with the decision below. In *United States* v. *Ayers*, 4 U. S. C. M. A. 220, 15 C. M. R. 220, the court dealt with a situation in which a soldier had been convicted during the Korean conflict of being absent without leave in time of war. The court recognized specifically that the Article dealing with desertion in time of war did not become inoperative for World War II pur-

poses until it was so rendered by S. J. Res. 123, *supra*, p. 45, in 1947. The court then indicated (see Pet. Br. 31) that the purpose of the particular Article should be considered, because this approach was dictated by Congressional precedent after World War II. The opinion stated (15 C. M. R. 227–8):

> Upon the termination of actual hostilities in World War II, Congress indicated unmistakably that it wished the War to terminate for certain purposes, but allowed it to remain in effect for others. Our concern in coping with this and other legal problems arising out of the Korean situation must be with determining as a matter of interpretation whether, within the framework of Congressional intent, war existed for the purposes of the specific provision under consideration.

This view is further elucidated in *United States* v. *Shell*, 7 U. S. C. M. A. 646, 23 C. M. R. 110, in which the court had to deal again with a conviction for desertion in time of war, and in which it concluded that for purposes of the particular Article the Truce Agreement between the United Nations command and the enemy command signaled the termination of the war. Said the court (23 C. M. R. at 114):

> Manifestly, if, *in the absence of formal Executive or Legislative action*, a collection of factors compels a conclusion that a state of war is being maintained, when those factors or a substantial part thereof no longer exist, a contrary deduction may be required. [Emphasis added.]

There would appear to be little doubt that, had Congressional action and intent been as specific as it was

after World War II, the court would not have decided the question of the war's end for itself. In deciding a question of interpretation in the face of Congressional silence, courts will often rest their determination on the basis of factors which reveal the probable intent. But if legislative intent is expressed by the political branches, as it was after World War II, the court need not and should not go any further. *Ludecke* v. *Watkins*, 335 U. S. 160, 170.

In short, the decisions of the Court of Military Appeals cited by petitioner are of scant assistance to him. Not only do they arise from an unusual historical situation, but, even more, their basic theory is in accord with the concept that courts will not independently view the facts to determine whether or not war has ceased, but will look to the political branches for that determination. Where the political branches refrain from making a formal declaration, various factors are considered by the courts, so that some indication of the political view and intent can be deduced. But that is not true where the political branches have themselves borne the responsibility of determining the status of war and peace. And the extreme care with which both political branches approached this problem in World War II (*supra*, pp. 42–49) demonstrate that their purpose was to keep all wartime legislation, which was not specifically repealed or terminated, in full force and effect until automatically ended by the final treaty of peace or formal termination of the war—which finally occurred on April 28, 1952. Since the wartime operation of Article 92 was not terminated

by Governmental action prior to the establishment of an official state of peace, the only conclusion which can be drawn is that, but for the fact that the Uniform Code of Military Justice became effective on May 31, 1951, the wartime phase of Article 92 would have expired only on April 28, 1952.

CONCLUSION

For the reason stated, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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